875

Mr Justice Catron

SUPREME COURT OF THE UNITED STATES.

Nos. 169 and 223.

SANTIAGO BRIGNARDELLO, JAMES LEE, —— BROWNING, —— FINK, SIN SIN, EDWARD MORAN, A. GRUENWALD, D. RAND, JOHN DOE, RAFAEL REIL, LOUISA SEVELD, HENRY ARNOCK, AND RICHARD ROE, PLAINTIFFS IN ERROR,

vs.

MATILDA C. GRAY AND FRANKLINA C. GRAY, BY FRANCIS S. SPRING, HER NEXT FRIEND.

No. 223.

MATILDA C. GRAY, PLAINTIFF IN ERROR,

vs.

SANTIAGO BRIGNARDELLO, JAMES LEE, —— BROWNING, —— FINK, SIN SIN, EDWARD MORAN, A. GRUENWALD, D. RAND, JOHN DOE, RAFAEL REIL, LOUISA, SEVELD, HENRY ARNOCK, AND RICHARD ROE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

GOVERNMENT PRINTING OFFICE.

87

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1 UNITED STATES OF AMERICA,
Northern district of California:

Pleas before the judges of the circuit court of the United States for the districts of California, in and for the northern district, at the court-house, in the city of San Francisco, on Monday, the 14th day of October, of the October term, in the year of our Lord one thousand eight hundred and sixty-one.

Witness the honorable M. Hall McAllister, judge of said court, and the honorable Ogden Hoffman, U. S. district judge for the northern district of California, *ss.*

Be it remembered that at the special October term, in the year of our Lord one thousand eight hundred and sixty-one, before the honorable M. Hall McAllister, judge of the circuit court of the United States for the districts of California, and the honorable Ogden Hoffman, U. S. district judge, at the court-house in the city of San Francisco, came Matilda C. Gray and Franklina C. Gray, by Francis S. Spring, her next friend, by Hall McAllister, esq'r., their attorney, and brought into said court, before the aforesaid judges thereof, their certain bill of complaint or declaration against Santiago Brignardello,
James Lee, ——— Browning, ——— Fink, Edward Moran,
2 D. Rand, Rafael Reil, Henry Arnock, Sin Sin, ——— Bonnet,
A. Gruenwald, John Doe, Louisa Seveld, and Richard Roe, defendants of a plea of trespass and ejectment, which said roll was filed April 27th, A. D. 1861, and follows in these words, that is to say:

3 *Complaint.*

In the circuit court of the United States for the districts of California in and for the northern district of said State.

MATILDA C. GRAY, and FRANKLINA C. GRAY,
by Francis S. Spring, her next friend,
against
SANTIAGO BRIGNARDELLO, JAMES LEE, ——— BROWNING, ——— FINK, EDWARD MORAN, D——— RAND, RAFAEL REIL, HENRY ARNOCK, ——— LINSIN, ——— BONNET, A. GRUENWALD, JOHN DOE, LOUISA SEVELD, RICHARD ROE.

STATE OF CALIFORNIA,
Northern district, ss:

The plaintiffs, Matilda C. Gray, by Hall McAllister, her attorney, and Franklina C. Gray, an infant under twenty-one years of age, by Francis S. Spring, her next friend, complain of the defendants, 4 Santiago Brignardello, James Lee, ——— Browning, ——— Fink, Edward Moran, D. Rand, ——— Bonnet, A. Gruenwald, Rafael Reil, ——— Linsin, Louisa Seveld, Henry Arnock, John Doe, and Richard Roe, and allege that each of the said plaintiffs is a citizen and resident of the State of New York, and each of the said defendants is a citizen and resident of the State of California; that heretofore, to wit, on the 15th day of July, 1853, one Franklin C. Gray was the owner in fee, entitled to the possession and in possession of ———, the following lands and premises, to wit, that certain lot or parcel of land, with the buildings thereon, situated in the city and county of San Francisco, in the northern district of the State of California, bounded and described as follows: Commencing at a point formed by the intersection of the northerly side of Pacific street with the easterly side of Dupont; running thence northerly along the easterly side of Dupont street forty feet to point; thence easterly, parallel with Pacific street, fifty-eight feet; thence southerly, parallel with Dupont street, forty feet to the northerly side of Pacific street; thence westerly along the northerly side of Pacific street, fifty-eight feet to the point or place of beginning.

That the said Franklin C. Gray did, on the 15th day of July, the owner in fee, entitled to possession and in possession of the 5 aforesaid premises, and the said plaintiffs then and thereupon became and were well and truly and jointly seized and possessed of the said lands and tenements, in their own right as heirs-at-law of the said decedent, and they, the plaintiffs, so continued jointly seized and possessed of the aforesaid premises until the twenty-sixth day of May, 1856, at which time and while the said plaintiffs were so the owners in fee, entitled to the possession and in possession of the said premises, the defendants wrongfully and unlawfully entered into and trespassed upon the said premises and unlawfully ousted and ejected the plaintiffs therefrom, and the said defendants have ever since continued and still continue in the wrongful possession thereof, and unlawfully withhold the possession thereof, and of every part thereof from the said plaintiffs.

The plaintiffs further aver that they are still the lawful owners of said premises, and are jointly entitled to entry therein and to the possession thereof, and that the value of said premises exceeds eighteen thousand dollars. They further say that by reason of said unlawful acts of the defendants they have been greatly damaged, to wit, in the sum of twenty thousand dollars.

6 And for a further and separate cause of action the plaintiffs allege that heretofore, before the commencement of this action, and prior to the wrongful entry and ouster hereinafter set forth, to wit, on or about the 15th day of July, 1853, the plaintiffs were the owners in fee, were lawfully entitled to the possession of, and were in the possession of the aforesaid premises hereinbefore described, as the heirs-at-law of one Franklin C. Gray, deceased, and being so entitled to the possession and in possession thereof, the above named defendants afterwards and before the commencement of this action, to wit, on or about the twenty-sixth day of May, 1856,

with force and arms broke into and entered upon the aforesaid premises of the plaintiffs and then ejected, and expelled, and removed the plaintiffs and each of them from their possession and occupation thereof, and have ever since kept and continued them and each of them so expelled and removed, and still so keep and continue them so expelled and removed; and during that time, that is, from said 26th day of May, 1856, up to the present time, the said defendants took and had and received to the use of them, the said defendants, all the rents, issues and profits of the aforesaid premises,
being of great monthly value, to wit, of the value of $250 per
7 month, whereby the plaintiffs, since said 26th day of May,
1856, down to the present time have lost the rents, issues,
and profits aforesaid, and also have been deprived of the use and means of repairing and cultivating the same, and other wrongs to the plaintiffs the defendants then did; by reason of all which acts the plaintiffs have been damaged to a great amount, to wit, to the amount of fifteen thousand dollars.

Wherefore the plaintiffs pray judgment that said defendants do forthwith deliver up to the plaintiffs the possession of the said premises hereinbefore described, and every portion thereof, and for judgment for damages and mesne profits against said defendants in the sum of thirty-five thousand dollars, together with the costs of this action.

Dated at San Francisco, 27th day of April, A. D. 1861.

HALL McALLISTER,
Attorney for plaintiffs.

Endorsed: Complaint in ejectment. Filed April 27th, 1861.
CUTLER McALLISTER, *Clerk.*

8 *Summons.*

UNITED STATES OF AMERICA:

In the circuit court of the United States for the districts of California in and for the northern district.

MATILDA C. GRAY AND FRANKLINA C. GRAY, &c., plaintiffs, *vs.* SANTIAGO BRIGNARDELLO *et als.*, defendants.	Action brought in said circuit court and the complaint filed in the city and county of San Francisco, in the office of the clerk of said circuit court.

The President of the United States, greeting, to Santiago Brignardello, James Lee, ——— Browning, ——— Fink, Edward Moran, D—— Rand, Rafael Reil, Henry Arnock. ———Linsin, ——— Bonnet, A. Gruenwald, John Doe, Louisa Sereld, Richard Roe.

You are hereby requested to appear in an action brought against you by the above named plaintiffs in the circuit court of the United States for the districts of California, and to file your plea, answer or demurrer to the complaint filed therein, (a copy of which accompanies

this summons,) in the office of the clerk of said court in the
9 city and county of San Francisco, within ten days, (exclusive of Sundays and day of service,) after the service on you of this summons if served in this county, or if served out of this county then within forty days, or judgment by default will be taken against you.

The said action is brought to recover the possession of a certain lot of land situated in the city and county of San Francisco, northern district of California, also for thirty-five thousand dollars damages, &c., with costs of suit, all of which is more particularly set forth in the complaint *in the complaint;* and if you to fail to appear and plead, answer or demur, as herein required, judgment by default will be entered against you.

Witness, the Honorable Roger B. Taney, chief justice of the Supreme Court of the United States of America, this 27th day
[SEAL.] of April, in the year of our Lord one thousand eight hundred and sixty-one and of our independence the eighty-fifth.

Attest: CUTLER McALLISTER, *Clerk.*

10 OFFICE OF THE MARSHALL OF THE
NORTHERN DISTRICT OF CALIFORNIA, *ss:*

I hereby certify that I received the within summons on the third day of June, A. D. 1861, and personally served the same on the third day of June, A. D. 1861, by delivering to Santiago Brignardello, James Lee, Frank Browning, D. Rand, Rafael Reil, H. Arnock, Linsin, Bonnet, A. Gruenwald and Louisa Sereld, said defendants, personally, in the city of San Francisco, a copy of said summons attached to a certified copy of the complaint.

Dated San Francisco this 4th day of June, A. D. 1681.

P. L. SOLOMON, *Marshall.*

Endorsed: Summons. Filed this sixth day of July, A. D. 1861.

CUTLER McALLISTER, *Clerk.*

11 *Answer.*

And now, on this 20th day of May, 1861, come the defendants and file their answer in the words and figures following, to wit:

In the circuit court of the United States for the districts of California in and for the northern district.

MATILDA C. GRAY *et als.*
vs.
SANTIAGO BRIGNARDELLO *et als.*

The defendants, by their attorneys, come and answer to the complaint in the above entitled cause, deny each and every allegation thereof.

And for a further and separate defence and answer the defendants say, that heretofore, to wit, on the 15th day of February, 1854, one

William H. Gray commenced an action in the district court of the fourth judicial district in and for the county of San Francisco, against the plaintiffs in this cause and against the administrators of the said Franklin C. Gray, deceased, wherein the said William H. Gray alleged in substance and to the effect, that he and the said Franklin C. Gray, deceased, in his lifetime were general partners in business
in the State of California, and that said partnership was un-
12 settled, and that the estate of said Franklin C. Gray was
largely indebted to said William H. Gray, on a fair and just settlement of said partnership account, and praying for such settlement and for a decree against said estate for whatever amount should be ascertained to be due to said William H. Gray, on the settlement of said partnership account, and for a distribution of the partnership property; and thereupon the plaintiffs in this suit and the said administrators were duly served with process in said cause, and filed their answers therein, the said Franklina C. Gray appearing by her guardian *ad litem*, duly and lawfully appointed, and thereupon such proceedings were had in said cause that afterwards, to wit, on the 27th day of October, 1855, a decree was rendered therein by said court to the effect that there was such a partnership as was alleged by the said William H. Gray, in his said complaint; and in by the said decree one James A. Thornton was appointed a commissioner to ascertain and report the state of the said partnership accounts, together with an account and description of the property of said partnership which remained undisposed of, and it was further adjudged, ordered and decreed, that said Thornton, as such commissioner, make sale of the said partnership property, receive the pur-
chase money therefor, and convey the property so sold to the
13 purchaser or purchasers thereof; and they further aver that
afterwards, to wit, on the 15th day of March, 1856, the said commissioner filed his report in the said cause, whereby it appeared that there was due to the said William H. Gray, from the estate of the said Franklin C. Gray, deceased, a large sum of money on account of the said partnership transactions; and the said commissioner also reported an account and description of the property of said partnership which remained undisposed of, and amongst the property so reported as belonging to said partnership were the premises described in the complaint in this action; whereupon by an order of said court the said report was in all things approved and confirmed, and it was further order, that said commissioner do proceed to sell all the property real and personal of the said partnership, as directed in the said former decree, and that he receive the proceeds of said sale, out of which he should pay the costs and expenses of said suit, and the remainder should be distributed to the several parties according to their respective interests, as ascertained and settled by the said former decree and the said report; and they further aver that in pursuance of said decree, and in accordance with law, and whilst the said decree was in full force, in nowise annulled, vacated, re-
versed, or set aside, the said Thornton, as such commissioner,
14 acting under and in virtue of said decree, did expose for sale

the premises described in the complaint in the manner and at the time and place required by said decree, and in strict conformity therewith, and at such sale the defendant Brignardello became the purchaser of the premises described in the complaint for the price and sum of $7,425, which he paid to said Thornton as such commissioner; and thereupon the said Thornton, as such commissioner, by a good and sufficient deed conveyed the said premises to said Brignardello, who thereby became the owner in fee of the said premises and entitled to the possession thereof, and by reason of the facts and conveyance aforesaid is still the owner in fee and entitled to the possession of said premises, and the other defendants are in possession of said premises, with the license and consent of said Brignardello, and as his tenants holding such possession in subordination to his title.

And for a further and separate answer and defence the said defendants aver that heretofore, to wit, on the 15th day of February, 1854, one William H. Gray commenced his action in the district court of the fourth judicial district in and for the county of San Francisco, State of California, against the plaintiffs in this suit
15 and the administrators of the estate of the said Franklin C. Gray, deceased, wherein the said William H. Gray alleged in substance and to the effect that he and the said Franklin C. Gray, deceased, in his lifetime were partners in business in the State of California, and that said partnership was unsettled, and that upon a fair and just settlement of said partnership accounts the estate of said Franklin C. Gray was indebted in a large sum to the said William H. Gray, and praying for such settlement and for a decree against said estate for whatever amount should be ascertained to be due to said William H. Gray on the settlement of said partnership account, and for a distribution of the said partnership property.

And they further aver that the plaintiffs in this suit and the said administrators were duly and lawfully served with process, and thereupon filed their answers therein, the said Franklina C. Gray appearing and answering by her guardian *ad litem*, duly and lawfully appointed therein.

And they further aver that heretofore, to wit, on the 14th day of April, 1855, one Cornelius J. Eaton commenced his action in the said district court against the plaintiffs in this suit, and the
16 aforesaid administrators, alleging in his complaint therein in substance and to the effect that he and the said Franklin C. Gray in his lifetime were partners in business in the State of California, and that the affairs of said partnership had not been settled, and praying for a settlement of said partnership, and for a distribution of said partnership property, and for a decree against said estate for whatever amount should be ascertained to be due to said Eaton on such settlement; and thereupon the plaintiff in this suit, and the said administrators, were duly served with process in said cause, and afterwards filed their answers therein, the said Franklina C. Gray appearing and answering by her guardian *ad litem*, duly and lawfully appointed therein; and thereupon the two causes aforesaid, by an

order of the said district court, duly entered, were ordered to be and were consolidated, and were ordered to proceed and be tried together, and such proceeding were thereupon had in said consolidated action; that afterwards, to wit, on the 27th day of October, 1855, a decree was rendered and entered therein by said court to the effect that there was such partnerships as were alleged by the said William H. Gray and C. J. Eaton, severally in their respective complaints, and in and by the said decree one James D. Thornton was appointed a 17 commissioner to ascertain and report the state of the partnership accounts, together with an account and description of the property of said partnerships which remained undisposed of; and it was further adjudged, ordered, and decreed, that said Thornton, as such commissioner, make sale of the said partnership property, receive the purchase money therefor, and convey the property so sold to the purchaser or purchasers thereof. And they further aver that afterwards, to wit, on the 15th day of March, 1856, the said commissioner filed his report in said cause, whereby it appeared that there was due to the said William H. Gray from the estate of the said Franklin C. Gray, deceased, a large sum of money on account of the said partnership transactions, and that there was also due from the estate of said Franklin C. Gray to the said C. J. Eaton a large sum of money on account of said partnership transactions. And the said commissioner also reported an account and description of the property of said partnership which remained undisposed of, and amongst the property so reported as belonging to said partnerships were the premises described in the complaint in this action, whereupon, by an order of said court, the said report was in all things approved and confirmed; and it was further ordered that said commissioner 18 do proceed to sell all the property, real and personal, of the said partnership, as directed in the said former decree, and that he receive the proceeds of said sale, out of which he should pay the costs and expenses of said suit, and the remainder should be distributed to the several parties according to their respective interests, as ascertained and settled by the said former decree and the said report. And they further aver that, in pursuance of the said decree, and in accordance with law, and whilst the said decree was in full force, in nowise reversed, annulled, vacated, or set aside, the said Thornton, as such commissioner, acting under and in obedience to said decree, did expose the said premises for sale in the manner and at the time and place required by said decree, and in strict conformity therewith, and at such sale the defendant Brignardello became the purchaser of the premises described in the complaint, for the price and sum of $7,425, which was paid to said commissioner by a good and sufficient deed, conveyed the said premises to said Brignardello, who thereby became the owner in fee of the said premises, and entitled to the possession thereof, and still is the owner in fee and entitled to the possession thereof, and the other defendants are in possession thereof as tenants of the said Brignardello and with his license and in subordination to his title, all which they are ready to verify.

CROCKET & CRITTENDEN,
Att'ys for def'ts.

19 Endorsed: Filed May 20th, 1861.
CUTLER McALLISTER, *Clerk.*

Replication.

And now, on this 27th day of May, 1861, comes the plaintiffs and file their replication in the words and figures following, to wit:

In the circuit court of the United States for the districts of California in and for the northern district.

MATILDA C. GRAY *et al.*
vs
SANTIAGO BRIGNARDELLO *et al.*

The plaintiffs, for replication to the answer, herein deny each and every and all and singular the allegations therein contained.

For a further and other replication, the plaintiffs allege that a certain decree was made on the 27th day of October, 1855, by the district court of the fourth judicial district of the State of California in the consolidated action of William H. Gray and Cornelius J. Eaton, plaintiffs against these now plaintiffs and others, defendants, and that certain other decrees and proceedings were thereafter had therein under and by virtue of which the defendants herein claim to have
20 acquired title to and possession of the premises in the complaint
herein mentioned, but the plaintiffs deny that said decree of October 27th, or any other decree or the said proceedings or any or either of said decrees or proceedings, was of the nature and effect, or in substance or to the effect set forth in the answer herein, or that said defendants acquired any title to said premises thereby or thereunder.

The plaintiffs further allege that the said decree of October 27th was fraudulent and void, for that it was entered against one of these plaintiffs, who is and was an infant, without any form of trial, all of which the defendant had due notice; that all of said alleged decrees, and said alleged sales, and said alleged proceedings and each of them, was from the beginning null and void, for that neither of these plaintiffs, then defendants in said actions, was served with a summons therein, and for that the said fourth district court had no jurisdiction in said action over these now plaintiffs, and then defendants, nor over the subject matter of said action ; for that the said court had no authority or jurisdiction to sell the same ; and that said alleged sale was illegal, null, and void ; that said alleged commissioner had had no power or authority to execute said alleged deed, and that said alleged deed conveyed no title to the premises in the complaint herein
21 mentioned; that subsequent to said alleged sale an appeal was
taken by these now plaintiffs to the supreme court of the State of California, from all the alleged decrees, sales, and proceedings of said fourth district court in said action; and that on said *said* appeal all the alleged decrees therein were reversed and vacated, and the said consolidated action was thereupon remanded to said fourth dis-

trict court for further proceedings; and that subsequently such proceedings were had therein, and thereupon a decree final was rendered in said action by said fourth district court in favor of these *now* plaintiffs and against each of the said plaintiffs therein, to wit, the said William H. Gray and Cornelius J. Eaton. Wherefore the plaintiffs pray for judgment as they have heretofore prayed, &c.

Dated at San Francisco, May 25th, 1861.

HALL McALLISTER, *Pl'ffs' Att'y.*

Endorsed: Filed May 27th, 1861.

CUTLER McALLISTER, *Clerk.*

22 *Stipulation as to evidence.*

And now, on this 10th day of December, 1861, the following stipulation was filed in said cause, in the words and figures following, to wit:

In the circuit court of the United States for the districts of California and for the northern district:

MATILDA C. GRAY *et al.*
vs.
SANTIAGO BRIGNARDELLO *et al.*

It is hereby stipulated by and between the respective parties herein that the testimony of Cornelius J. Eaton, a witness on the part of the plaintiffs in this action, be taken before any notary public for the city and county of San Francisco, or a commissioner of the United States, by deposition, on the 13th day of October, 1861, at 10 o'clock a. m. of said day, at the office of Crockett & Crittenden, in the city of San Francisco, and that said deposition may be read upon the trial of said action, subject to all legal objections and exceptions, save only as to the mode and manner of giving notice and of taking the said deposition.

SAN FRANCISCO, 11 *Oct'r,* 1861.

CROCKETT & CRITTENDEN.
Att'ys for Def'ts.

23 *Stipulation as to evidence.*

In the circuit court of the United States for the districts of California in and for the northern district:

MATILDA C. GRAY *et al.*
vs.
RICHARD C. LARRIMORE *et al.*

MATILDA C. GRAY *et al.*
vs.
RICHARD B. MONKS *et al.*

MATILDA C. GRAY *et al.*
vs.
SIMON REARDON *et al.*

Matilda C. Gray *et al.*
vs.
Patrick Plover *et al.*

Matilda C. Gray *et al.*
vs.
William A. Piper *et al.*

Matilda C. Gray *et al.*
vs.
Martin Murphy, jr., *et al.*

24 Matilda C. Gray *et al.*
vs.
John McGuire *et al.*

Matilda C. Gray *et al.*
vs.
T. J. A. Chambers *et al.*

It is hereby stipulated that the deposition of the witness Cornelius J. Eaton, taken under the foregoing stipulation, may be read in evidence on the part of the plaintiffs in each of the above cases, in the same manner and subject to the same exceptions as provided in the case of Gray *et al.* vs. Brignardello *et al.* and with the same effect if taken anew in each of the above cases.

San Francisco, 11 *Oct'r*, 1861.

CROCKETT & CRITTENDEN,
Att'ys for Def'ts.

It is further stipulated and agreed by and between the respective parties hereto, for the purpose of saving the necessity of examining the witness Eaton, that on the trial of each and all of the cases embraced within the two foregoing stipulations, it shall be admitted—

First. That Franklin C. Gray died in the year 1853, and that for some months before his decease he had been in possession of, 25 claiming title to, all the premises mentioned in each complaint in each of said actions, and that his representatives remained in possession of said premises, and each of them claiming title thereto, down to the time of the sale of said premises by one J. D. Thornton.

Second. That immediately after said sale the defendants in each of the above actions, or those from whom they desire title and possession, entered upon and took possession of the premises mentioned respectively in each complaint, in each action, and that each of said defendants so entered into possession under the title claimed by them to have been derived from the said Franklin C. Gray, through the said sale by the J. D. Thornton.

San Francisco, *Oct.* 15, 1861.

CROCKETT & CRITTENDENT,
Att'ys for Def'ts.

Endorsed: Filed Dec'r 10th, 1861.

CUTLER McALLISTER, *Clerk.*

26 *Proceedings in court.*

And now, on this 10th day of December, A. D. 1861, the following proceedings in open court were had in this cause, to wit:

TUESDAY, *Dec'r* 10*th*, *A. D.* 1861.

Present: Hon. M. Hall McAllister, circuit judge; Hon. Ogden Hoffman, district judge.

MATILDA C. GRAY *et al.*
vs. } At common law.
SANTIAGO BRIGNARDELLO *et al.*

And now, at this day, the trial of this cause having been heretofore set for to-day, came the plaintiffs with their attorneys and the defendants with their attornies into court; and the marshall having returned the venue heretofore issued herein, and come the jury, and the following named persons were duly sworn and empannelled the issue to try, to wit:

J. C. Low, G. R. Read, J. D. Alexander, B. W. Hathaway, C. G. Rudd, H. H. Bancroft, J. C. Johnson, G. A. Swasey, Geo. J. Brooks, Wm. M. Lent, Thos. Rutherford, D. B. Stover, J. C. McCener, William J. Bryan, C. G. Howard, were sworn as witnesses for the plaintiffs.

27 *Further proceedings in court.*

And now, on this 12th day of December, A. D. 1861, the following further proceedings in open court were had in this court, to wit:

THURSDAY, *Dec'r* 12*th*, *A. D.*, 1861.

Present: Hon. M. Hall McAllister, circuit judge; Hon. Ogden Hoffman, district judge.

MATILDA C. GRAY *et al.*
vs. } At common law.
SANTIAGO BRIGNARDELLO *et al.*

And now, at this day, came the parties to this suit by their respective attorneys, and also came the jurors, heretofore empannelled, into court, and objections to evidence were argued by Hall McAllister, esq. for pl'ffs, and by J. B. Crockett for def'ts, thereupon the jury were discharged until Saturday, and the further argument postponed until to-morrow, Friday 13th.

28 *Further proceedings in court.*

And now, on this 13th day of December, A. D. 1861, the following further proceedings in open court were had in this court, to wit:

FRIDAY, *December* 13*th*, *A. D.* 1861.

Present: M. Hall McAllister, circuit judge; Hon. Ogden Hoffman, district judge.

MATILDA C. GRAY *et al.*
vs. } At common law.
SANTIAGO BRIGNARDELLO *et al.*

And now, at this day, come the parties to this suit, by their respective attorneys, and the argument on objections to evidence were argued by J. B. Crockett, esq., for defendants, and by Hall McAllister, for plaintiffs, and the cause was continued until to-morrow, Saturday, December 14th, A. D. 1861.

29 *Further proceedings in court.*

And now, on this 14th day of December, A. D. 1861, the following further proceedings in open court were had in this court, to wit:

SATURDAY, *December* 14*th*, *A. D.* 1861,

Present: Hon. M. Hall McAllister, circuit judge.

MATILDA C. GRAY *et al.*
vs. } At common law.
SANTIAGO BRIGNARDELLO *et al.*

And now, at this day, come the parties to this cause, by their respective attorneys, and also came the jury heretofore empanelled herein, and on motion of Hall McAllister, attorney for plaintiff, it is ordered that the further hearing of this cause be postponed until Monday, Dec'r 23rd, at 11 o'clock a. m.

30 *Further procedings in court.*

And now, on this 23rd day of December, A. D. 1861, the following further proceedings in open court were had in this court, to wit :

MONDAY, *Dec'r* 23, *A. D.* 1861.

Present : Hon. M. Hall McAllister, circuit judge; Hon. Ogden Hoffman, district judge.

MATILDA C. GRAY *et al.*
vs. } At common law.
SANTIAGO BRIGNARDELLO *et al.*

And now, at this day, come the parties to this suit, by their respective attorneys, and also come the jurors heretofore empanelled herein, and the court having decided certain questions of evidence, it is ordered that the further trial of this cause be continued until Saturday, December 28th, at 11 o'clock a. m.

31 *Further proceedings in court.*

And now, on this 28th day of December, A. D. 1861, the following further proceedings in open court were had in this court, to wit ;

SATURDAY, *Dec'r 28th, A. D.* 1861.

Present: Hon. Ogden Hoffman, district judge.

MATILDA C. GRAY *et al.*
vs.
SANTIAGO BRIGNARDELLO *et al.* } At common law.

And now, at this day, come the parties to this cause, by their respective attorneys, and also come the jurors heretofore empannelled herein, and on motion of Hall McAllister, esq., attorney for plaintiffs, it is ordered by the court that the court for mesne profits set forth in the complaint be withdrawn. L. Humphreys, Otmar Calen, James D. Thornton, R. C. Hopkins, and T. J. A. Chambers were sworn as witnesses for defendants. And it is ordered by the court that the further hearing of this cause be adjourned until Friday, January 3rd, 1861, at 11 o'clock a. m.

32 *Further proceedings in court.*

And now, on this 3rd day of January, A. D. 1862, the following further proceedings in open court were had in this court, to wit:

FRIDAY, *January 3rd, A. D.* 1861.

Present: Hon. Ogden Hoffman, district judge.

MATILDA C. GRAY *et al.*
vs.
SANTIAGO BRIGNARDELLO. } At common law.

And now, at this day, come the parties to this cause, by their respective attorneys, and also come the jury heretofore empannelled herein, and the trial of this cause was continued. J. B. Crockett summed up the case on behalf of the defendants, and Hall McAllister, esq., on behalf of the plaintiffs. The argument on both sides having been closed, the court charged *charged* the jury upon the law of the case; whereupon the jury, through their foreman, do bring in the following verdict:

In the circuit court of the United States in and for the northern district.

33 MATILDA C. GRAY and
FRANKLINA C. GRAY, by
FRANCIS S. SPRING, her next
friend,
against
SANTIAGO BRIGNARDELLO *et al.* }

We, the jury in the above-entitled action, find in favor of the defendants against the plaintiff, Matilda C. Gray. And we do further find in favor of the plantiff, Franklina C. Gray, suing by her next friend, Francis S. Spring, and against the defendants, for the possession of an undivided one-half of the premises described in the complaint, and that the value of said undivided one-half exceeds the sum of $2,000.

Dated January 3, 1861.

WM. M. LENT, *Foreman.*

34 *Judgment.*

And now, on this 3d day of January, A. D. 1862, judgment was entered in said cause in the words and figures following, to wit:

UNITED STATES OF AMERICA,
State of California:

In the circuit court of the United States in and for the northern district.

MATILDA C. GRAY and FRANLINA C. GRAY, by FRANCIS S. SPRING, her next *next* friend, plaintiffs,
vs.
SANTIAGO BRIGNARDELLO, JAMES LEE, ——— BROWNING, ——— FINK, SIN SIN, EDWARD MORAN. A. GRUENWALD, D. RAND, JOHN DOE, RAFAEL REIL, LOUISA SEVELD, HENRY ARNOCK, RICHARD ROE, defendants.

Judgment.

This cause having come up regularly for trial at the present term of this court, came the plaintiff by Hall McAllister, esq., their attorney, and the said infant, Franklina C. Gray, by Francis S. Spring, her next friend, and the defendants by Crockett & Crittenden,
35 their attorneys, and thereupon came a jury of twelve good and lawful men, to wit: J. C. Low, B. W. Hathaway, J. C. Johnson, J. R. Mead, Wm. M. Lent, C. G. Rudd, G. A. Swasey, Thos. Rutherford, J. D. Alexander, H. H. Bancroft, Geo. J. Brooks, D. B. Stover, who being duly elected, tried, and sworn the truth to speak upon the issue joined, took their oaths in the jury box. The plaintiffs then proceeded to adduce and read to the court and jury the evidence on their parts, and the defendants also adduced and read to the jury and court the evidence on their parts. The evidence being closed on both sides, and the argument of the counsel heard, the court charged the jury touching the matters of law, and the jury rendered their verdict in the words and figures following, to wit:

In the circuit court of the United States for the districts of California, in and for the northern district.

MATILDA C. GRAY and FRANKLINA C. GRAY, by FRANCIS S. SPRING, her next friend,
against
SANTIAGO BRIGNARDELLO, JAMES LEE, *et al.*

36 We, the jury in the above-entitled action, find in favor of the defendants, as against the plaintiff, Matilda C. Gray. And

we do further find in favor of the plaintiff, Franklina C. Gray, suing by her next friend, Francis S. Spring, and against the defendants, for the possession of an undivided one-half of the premises described in the complaint; and that the value of said undivided one-half exceeds the sum of $2,000.

Dated January 3d, 1861.

W. M. LENT, *Foreman.*

Wherefore, by reason of the law and the premises, it is ordered, adjudged, and decreed by the court that the plaintiff, Matilda C. Gray, take nothing by reason of her complaint herein; that Franklina C. Gray, by Francis S. Spring, her next friend, do have and recover judgment against the defendants, Santiago Brignardello, James Lee, ——— Browning, ——— Fink, Edward Moran, D. Rand, Rafael Reil, Henry Arnock, ——— Bonnet, Sin Sin, A. Gruenwald, John Doe, Louisa Seveld, and Richard Roe, for the possession and restitution of one undivided half of the following described premises, namely: that certain lot or parcel of land, with the buildings thereon, situated in the city and county of San Francisco, in the northern district of California, commencing at a point formed by the 37 intersection of the northerly side of Pacific street with the easterly side of Dupont street; running thence northerly along the easterly side of Dupont street forty feet to a point; thence easterly, parallel with Pacific street, fifty-eight feet; thence southerly, parallel with Dupont street, forty feet, to the northerly side of Pacific street; thence westerly, along the northerly side of Pacific street, fifty-eight feet, to the point of beginning; together with all and singular the tenements and improvements thereon, with her costs and disbursements in this behalf expended, amounting to the sum of two hundred and eighty-nine $\frac{30}{100}$ dollars.

SAN FRANCISCO, *Jan'y 3rd*, 1862.

Endorsed: Filed Jan'y 3d, 1862.

CUTLER McALLISTER. *Clerk.*

38 And now come the defendants and file their bill of exceptions, in the words and figures following, to wit:

In the circuit court of the United States for the districts of California, in and for the northern district.

MATILDA C. GRAY, and FRANKLINA C. GRAY, by her next friend, FRANCIS S. SPRING, *vs.* SANTIAGO BRIGNARDELLO *et als.*	Bill of exceptions.

Be it remembered that on the calling of this cause for trial, on the tenth day of December, A. D. 1861, a jury was empannelled and sworn to try the issues between the parties plaintiff and defendant; and thereupon the plaintiffs, to support the issues on their behalf, proved that one Franklin C. Gray, in his lifetime, and at the time of his death, was the owner in fee of the premises described in the

complaint; that in the month of March, 1853, the said Gray was
lawfully married to the plaintiff, Matilda C. Gray, at Wash-
39 ington, D. C.; that in the month of July, 1853, the said
Franklin C. Gray died in the State of New York, intestate,
and in the month of December, 1853, the plaintiff, Franklina C. Gray, was born, being the lawful issue of the marriage between the said Franklin C. Gray and the said Matilda C. Gray. It was further proved that the defendants, at the time of the commencement of this action, were in the actual possession of the premises described in the complaint; and it was admitted that at the time of his death the said Franklin C. Gray had no lawful issue, except the said Franklina C. Gray, who was subsequently born of said marriage, as aforesaid.

The plaintiffs then read the following stipulation signed by the defendants' counsel.

In the circuit court of the United States for the districts of California, in and for the northern district.

40 MATILDA C. GRAY *et al.*
vs.
SANTIAGO BRIGNARDELLO *et al.*

MATILDA C. GRAY *et al.*
vs.
RICHARD LARRIMORE *et al.*

MATILDA C. GRAY *et al.*
vs.
RICHARD B. MONKS *et al.*

MATILDA C. GRAY *et al.*
vs.
SIMON REARDON *et al.*

MATILDA C. GRAY *et al.*
vs.
PATRICK PLOVER *et al.*

MATILDA C. GRAY *et al.*
vs.
WILLIAM A. PIPER *et al.*

MATILDA C. GRAY *et al.*
vs.
MARTIN MURPHY, s'r, *et al.*

MATILDA C. GRAY *et al.*
vs.
JOHN MCGUIRE *et al.*

41 MATILDA C. GRAY *et al.*
vs.
T. J. A. CHAMBERS *et al.*

It is hereby stipulated that the deposition of the witness, Cornelius J. Eaton, taken under the foregoing stipulation, may be read in evidence on the part of the plaintiff, in each of the above cases, in the same manner and subject to the same exceptions as provided in the case of Gray *et al. vs.* Brignardello *et al.*, and with the same effect as if taken anew in each of the above cases.

SAN FRANCISCO, 11*th October*, 1861.

CROCKETT & CRITTENDEN,
Att'y for Def'ts.

It is further stipulated and agreed by and between the respective parties hereto, for the purpose of saving the necessity of examining the witness Eaton, that on the trial of each and all of the cases embraced within the two foregoing stipulations, it shall be admitted—

First. That Franklin C. Gray died in the year 1853, and that for some months before his decease he had been in possession of, claiming title to, all the premises mentioned in each complaint, in each of said actions, and that his representatives remained in posses-
42 sion of said premises, and each of them, claiming title thereto, down to the time of the sale of said premises by one J. D. Thornton.

Second. That immediately after said sale the defendants in each of the above actions, or those from whom they derive title and possession, entered upon and took possession of the premises mentioned respectively in each complaint in each action; and that each of said defendants so entered into possession under the title claimed by them to have been derived from the said Franklin C. Gray, through the said sale by the said J. D. Thornton.

SAN FRANCISCO, *Oct.* 15*th*, 1861.

CROCKETT & CRITTENDEN,
Att'ys for Def'ts.

Endorsed:

U. S. circuit court, districts of California, northern district.

MATILDA C. GRAY *et al.*
vs.
S. BRIGNARDELLO *et al.*
} Copy of stipulation.

43 The plaintiffs then rested.

The defendants, to support the issues upon their behalf, then offered in evidence the judgment roll, in the consolidated actions of William H. Gray *vs.* Joseph C. Palmer, adm'r, *et als.*, and Cornelius J. Eaton *vs.* Joseph C. Palmer, adm'r, *et als.*, which actions were heretofore pending and decided in the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco, of which judgment roll the following is a copy:

Complaint.

In the district court, fourth judicial district.

WILLIAM H. GRAY
vs.
CORNELIUS J. EATON AND JOSEPH C. PALMER, administrators of the estate of Franklin C. Gray, Matilda C. Gray, and James Gray.

COUNTY OF SAN FRANCISCO, *ss:*

The plaintiff, William A. Gray, avers and shows to the court as follows, to wit: That he and Franklin C. Gray, deceased, 44 were brothers, and in the latter part of the year 1848 the plaintiff was residing at St. Louis, Missouri, and the said Franklin C. Gray in the State of Illinois; that about that period the said Franklin, on account of some domestic troubles, was desirous to go off upon a long journey, and as the plaintiff had before then been for some months in the Mexican republic, the said Franklin proposed that they should go upon a trading expedition, upon their joint account, to Santa Fé and Chihuahua, in New Mexico, and thence through Mexico generally, one of the inducements to said enterprise being that the plaintiff was familiar with the language, manners, and customs of the Mexican people. After some negotiation the agreement was made as proposed, and the understanding was that they were to set out early in the ensuing spring. In the mean time the said Franklin having business at Washington, went there to adjust it, and whilst there the rumors of the discovery of gold in California were confirmed; whereupon the said Franklin at once wrote to the plaintiff that California was the proper field for their intended operations, and that he would at once embark from New York for Chagres, and that the plaintiff must make arrangements to meet him either at that point, or, if possible, at Havana. On the receipt of the letter the plaintiff at once proceeded to wind up his business at St. Louis, and in 45 January, 1849, arrived at New Orleans on his way to California, *via* Panama. But on his arrival at New Orleans, learning that there was little or no prospect of obtaining transportation from Panama on account of the crowd of passengers then assembled there, he retraced his steps to St. Louis, and in the spring of 1849 set out across the plains for California, arriving here in October of that year. On his arrival he met the said Franklin, who had then been here about four months, which he had employed profitably, and during that period had earned and realized a considerable sum of money. He gave the plaintiff a full account of his operations, and distinctly stated that, regarding their previous arrangement as in full force, he (the plaintiff) was justly and fairly entitled to one-half of all that he (Franklin) had acquired in California up to that time, and that thenceforth all their operations in California would be upon joint account, and that all profits and losses in their business should be

equally divided between them. But the plaintiff proposed that inasmuch
as the said Franklin had already accumulated a handsome
capital without his (the plaintiff's) aid, he (plaintiff) would be content
with one-third, instead of one-half, interest in the fund already
on hand, and in their future acquisitions. To this the said
46 Franklin at once distinctly assented, and immediately drew
up, executed, and delivered to the plaintiff a written stipulation
to that effect, setting forth implicitly that the plaintiff was entitled
to one-third of the acquisitions of the said Franklin in California
up to that period, and that in all their subsequent business operations
in this State, of whatsoever nature, they were to be jointly interested,
the plaintiff to the extent of one-third, and the said Franklin
two-thirds. It was then agreed that they would open a commercial
house in San Francisco, under the firm and style of F. C. Gray &
Co., which should be chiefly under the control and management of
the plaintiff, whilst the said Franklin would devote himself to other
pursuits for their joint benefit. The commercial house was accordingly
opened, and continued to be conducted by the plaintiff until a
recent period, he having put into the concern of his own money about
nine hundred dollars, in addition to that purchased by said Franklin.
They proceeded in business prosperously, and by their joint efforts
and industry increased their capital and means rapidly, the management
and control of which was entrusted almost exclusively to the
said Franklin, in whom the plaintiff had the most implicit confidence.
47 They embarked exclusively in real estate operations,and
in other business enterprises, which were conducted exclusively
in the name of said Franklin, notwithstanding the plaintiff was interested
to the extent of one-third in the whole of them, as hereinbefore
set forth. In this manner the said Franklin bought and sold real
estate, taking the titles in his own name, though for their joint benefit,
and engaged in other lucrative enterprises, from which large
profits were realized, and which were conducted in the sole name of
said Franklin, though with their joint capital, and for their joint advantage.
and on their joint account. By these means they succeeded
in accumulating a large estate, consisting of houses and lots, in the
city of San Francisco, lands in other portions of the State of California,
debts and monied demands due to them, and a large sum in
ready cash, to one-third of all which the plaintiff was and is jointly
entitled by virtue of the copartnership agreement aforesaid.

The plaintiff further avers that the said written agreement or
article of copartnership remained in his possession until June, 1851,
during which month, at what is known as the "June fire," the
48 room occupied by him, together with all his private papers,
were consumed by fire, and amongst others the paper aforesaid,
so that he is unable to produce the same, or a copy thereof, to
the court, but will establish its existence, contents, and loss by satisfactory
proof, if required. Thus their affairs continued until the
month of July, 1853, when the said Franklin C. Gray was suddenly
killed on a railroad track in the State of New York, having but
recently before then been married to the defendant, Matilda C. Gray,

who is a citizen and resident either of the said State of New York or of the District of Columbia, and is neither a citizen nor resident of the State of California ; but by said marriage the said Franklin did not leave any issue, nor did he leave a last will or testament, so far as the said plaintiff knows or believes.

The plaintiff further states that letters of administration have been granted by the probate court of San Francisco county to the defendants Cornelius J. Eaton and Joseph C. Palmer upon the said estate, and they have duly qualified and taken upon themselves the duties of the said trust. And the said Eaton in his own right claims some
interest in said estate by virtue of some contract or conveyance
49 made by said Franklin in his lifetime, as the plaintiff has been
informed. The plaintiff avers that, so far as he knows or has been able to ascertain, the estate of which the said Franklin died seized and possessed is truly set forth in the schedule hereunto annexed, marked Exhibit A, and which he prays may be taken and considered as a part hereof ; all of which has been acquired by said Franklin in California, subject to and in pursuance of the said copartnership agreement, and to one-third of which the plaintiff is justly and lawfully entitled, by virtue of the said agreement. He further avers that James Gray, of Switzerland county, in the State of Indiana, is the father of said Franklin and the plaintiff, and is yet living, as the plaintiff verily believes.

The said Franklin having died intestate and without issue, the said James succeeds to a portion of his estate as his heir at law ; but whether the said Matilda C. Gray is entitled to the remainder of said estate, the plaintiff does not know, but submits it to the court. The plaintiff does not know of any liens or mortgages upon the estate.

The premises being considered, he prays that the said Cornelius
J. Eaton, in his own right, and as administrator as aforesaid,
50 the said Palmer as administrator as aforesaid, and the said
James Gray, and Matilda C. Gray, be made defendants hereto, and that they be required to interplead and exhibit their respective interests in said estate; and on a final trial he prays that one equal third part of said estate, of whatsoever the same consists, and wheresoever situate, be adjudged and decreed to him, under the copartnership agreement aforesaid, and that partition thereof be made between the plaintiffs and the defendants according to their several rights. He prays that said copartnership be adjudged to be dissolved, and that the accounts thereof be finally adjusted and settled according to the rights of the copartners, and for such other and further relief as in equity and good conscience he is entitled to.

CROCKETT, PAGE, & TEVIS,
Attorneys for Plaintiff.
PARSONS, COOK, & OLDS, *Counsel.*

STATE OF CALIFORNIA,
County of San Francisco, ss:

William H. Gray, the plaintiff, being duly sworn, deposes that the foregoing complaint has been read in his hearing and he knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

W. H. GRAY.

51 Subscribed and sworn to this 13 day of February, 1854.

[SEAL.] WM. HART,
Notary Public, San Francisco.

Exhibit A.

Cr. statement of accounts on books of Gray & Eaton, 16*th Aug't,* 1853.

Bills receivable:		
Note drawn by Gray & Starr, dated 19th Feb'y, 1852,	3,086 89	
" " by Samuel Marx, 8th July, 1852	375 00	
" " by Lewis Thompson, 2nd October, 1852	150 00	
" " by A. Gorham, 18th Nov., 1852	150 00	
" " by H. M. Lewis, 5th Feb'y, 1853	500 00	
" " by W. H. Gray, 23rd March, 1853	2,600 00	
" " by Gray & Starr, 1st July, 1853	500 00	
" " by James R. Travers, 16th July 1853	3,000 00	
		10,361 89
B. S. E. Bonneville, Dr		51 42
Merchandize		18,013 45
E. D. Baker		425 00
Frémont claims *vs.* U. S. government		16,020 35
		$44,872 11

Dr. bills payable:		
Note to Luther Pearson, Dec. 10th, Sept., 1853	615 00	
" " do. do. " " Dec., 1853	615 00	
" " do. do. " " March, 1854	615 00	
" " do. do. " " June, 1854	615 00	
52 " " do. do. " " Sept'r, 1854	615 00	
" " do. do. " " Sept'r, 1854	8,200 00	
James Gallagher, " 13th Sept'r, 1854	2,500 00	
Righter, " 18th July, 1853	2,000 00	
George Dennis, " 15th July, 1853	2,000 00	
George Dennis, Dec. 25th, July, 1853	1,000 00	
John Cowell, dated July 11th, 1853, on demand	1,000 00	
		19,775 00
Amount due from F. C. Gray to C. J. Eaton, on private account	5,369 33	5,369 33
Amount of cash due the estate of F. C. Gray, from T. J. A. Chambers, about	1,500 00	
Amount due do. do. from the El Dorado, as near as can be ascertained on the 15th day of July, 1853	2,850 00	
Amount supposed to be in the hands of John Cook, esq're, of New York city	4,900 00	
		$9,250 00

Debts due and payable out of the estate of F. C. Gray, due on his private account and of draft of F. C. Gray, favor Burgoyne & Co., due on the 3rd day of Sept'r, 1853	3, 330 00	
Do. do. do. due on the 12th October, 1853	3, 270 00	
		$6, 600 00

Debts due the estate of F. C. Gray.

	Note, James Hyslop,	dated	11th October, 1850	800 00
	" W. F. Swasey,	"	4th January, 1850	400 00
	" E. R. Clay,	"	9th Oct'r, 1849	332 00
	" T. A. Longacre,	"	16th Jan'y, 1849	100 00
	" Richard Larrimore,	"	16th Oct'r, 1850	400 00
	" Richard Larrimore,	"	do. do. do	400 00
	" James L. Treanor,	"	18th Jan'y, do	600 00
	Draft, O. H. West,	"	12th Jan'y, do	325 00
53	" Do. do.	"	23d do. do	345 00
	Check, do.	"	15th Feb'y, do	570 00
	Note, T. B. Shaeffer,	dated	6th March, 1850	224 00
				$4, 496 00

Also, judgment against J. S. Graham *et al.*, dated 24th January, 1852, in the superior court of San Francisco, for $5,782 $\frac{33}{100}$, with interest at 10 per cent. per annum until paid, together with the costs.

Also, judgment against J. B. Steinberger, dated the 8th June, 1850, for $14,543 $\frac{41}{100}$, with interest at $12\frac{1}{2}$ per centum per mo. until paid in the district court for the 4th judicial district.

Also, a claim of F. C. Gray, du. against the government of the United States, in the hands of his attorney, a Mr. Constine, of Washington, D. C.

Also, a claim of one Volney Orttlander, assigned to F. C. Gray, in the hands of Mr. Constine.

Also, a suit of said Gray against the estate of Anderson, deceased, in the State of Illinois, in which —— Keck, esq., of Chicago, is attorney.

Also, Sacramento city and State scrip amounting to one hundred and seven dollars.

Also, an unadjudged interest in the business of the El Dorado, from
the 15th day of July, 1853, to the 16th day of August, 1853,
54 on which day we heard of the death of F. C. Gray.

Real estate.

Southeast corner of Stockton and Vallejo street, in the city of San Francisco, $68\frac{9}{12}$ by $137\frac{1}{2}$ feet.

Northeast corner of Pacific and Dupont streets, $114\frac{1}{2}$ feet by 58 feet.

The undivided half of 50-vara lots Nos. 493, 494, 415, and 416.

The undivided half of 50-vara water lots Nos. 1520 and 1521.

The undivided half of beach and water lot No. 40.

The undivided half of 100-vara lot No. 145.

The undivided fourth part of El Dorado.

The undivided fourth part of drinking house in Dunbar alley, lot 14 feet by 23 feet.

Lot on Pacific street between Dupont and Kearney, 26½ feet by 137½ feet.

Property purchased of Luther Pearson, unpaid for, on Pacific between Kearney and Dupont.

55 51, 10 feet by 137, 6 feet adj'n. 114, 6 by 58.
Dunbar alley, 23 by 28.
Ohio street, 20 by 60.
Broadway near Ohio, 17 by 57.
Water lots in litigation, 625, 630, 635, 641, 759.
Two leagues of land in Contra Costa county.

Endorsed: Complaint. Filed Feb'y 15, 1854.

R. C. HOPKINS, *D. Cl'k.*

Summons.

The people of the State of California to Cornelius J. Eaton, with Joseph C. Palmer, administrator of the estate of Franklin C. Gray, deceased, Matilda C. Gray, and Jas. Gray, greeting:

You are hereby summoned to appear and answer in said court unto the complaint of William H. Gray, in an action to petition the estate of Franklin C. Gray, deceased, between the plaintiff and the
56 defendants, according to their several rights thereto, the plaintiff claiming one equal third part of said estate under a certain agreement of coparternship, made between him and the deceased, and that you, in your own right and as administrator of said estate, be required to implead and exhibit your interest, if any, to the same, &c., filed in our said court, within 10 days after the service of this writ if served in said county, and within forty days if served in any other county, or judgment by default will be taken against you, and the plaintiff will apply to the court for the relief demanded in his said complaint.

Witness Hon. Delos Lake, judge of the fourth judicial district of said State, this fourteenth day of February, A. D. 1854.

[SEAL.] THOMAS HAYES, *Clerk,*
By OTMAR CALN, *Dep Cl'k.*

Endorsed:

Summons and order of publication.

OFFICE OF THE SHERIFF OF SAN FRANCISCO COUNTY.

I hereby certify that I received the within writ on the 17th day of February, 1854, on Cornelius J. Eaton, by delivering to the said defendant, personally, in the city of San Francisco, a copy
57 of the within summons together with a certified copy of complaint.

SAN FRANCISCO, *Feb'y 28th*, 1854.

WM. R. GORHAM, *Sh'ff,*
By J. HARRISON, *Deputy.*

Summons and order of publication.

State of California,
County of San Francisco:

In the district court of the fourth judicial district of said State.

The people of the State of California to Cornelius J. Eaton, Joseph C. Palmer, adm'r of the estate of Franklin C. Gray, deceased, Matilda C. Gray, James Gray, and Gray, infant daughter of F. C. Gray, greeting:

You are hereby summoned to appear and answer in said court, unto
the complaint of William H. Gray, in an action to partition the estate
of F. C. Gray, deceased, between the plaintiff and the defendants
according to the several rights thereto, the plaintiff claiming
58 one equal third part of said estate under a certain copartner-
ship agreement made between him and the deceased, and that
you, in your own right, and as administrator of said state, be required to interplead and exhibit your interest, if any, to the same, &c., filed in our said court, within ten days after service of this writ if served in said county, and within forty days if served in any other county, or judgment by default will be taken against you, and the plaintiff will apply to the court for the relief demanded.

Witness Hon. Delos Lake, judge of the fourth judicial district of said State, this fifth day of July, A. D. 1854.

THOMAS HAYES, *Clerk.*

It appearing to the satisfaction of the court that ——— Gray, whose christian name is unknown, infant daughter of Franklin C. Gray, deceased, resides out of this State, and that she is a necessary party to the above-entitled action, it is ordered that summons against said infant be published in the "Placer Times and Transcript," a newspaper published in the city of San Francisco, once a week for three months.

It is further ordered that a copy of the summons and complaint
be forthwith deposited in the post office at San Francisco, directed to
——— Gray, infant daughter of Franklin C. Gray, deceased,
59 to the care of Matilda C. Gray, her mother, Brooklyn, New
York. By the court.

June 28*th*, 1854.

The foregoing is a true copy of the order made by the court in the above-entitled action. Attest, &c.

THOMAS HAYES, *Cl'k.*

Crockett, Page & Tevis,
Att'ys for Pl'ff.

Oath of printer.

State of California,
City and County of San Francisco, ss:

L. Humphrey, clerk in the office of the Placer Times and Transcript, a daily and weekly newspaper published in said city and county, being duly sworn, deposes and says that the notice, of which the annexed printed notice is a copy, has been published in said paper at least once a week for three months, commencing on the thirtieth day July, 1854, and ending on the twelfth day of October, 1854.

L. HUMPHREY.

Subscribed and sworn before me this 21st day of Nov'r, 1854.

[SEAL.] WM. L. HIGGINS,
Notary Public.

Endorsed: Filed Dec. 8, 1854.

WOOD, *D. C.*

60 *Oath of service by P. O.*

District court, 4th judicial district, county of San Francisco.

WILLIAM H. GRAY
vs.
CORNELIUS J. EATON and JOSEPH C. PALMER, administrators of the estate of F. C. Gray, dec'd, Matilda C. Gray, James Gray, and —— Gray, infant daughter of F. C. Gray.

STATE OF CALIFORNIA,
County of San Francisco, ss:

This day Isaac J. Wistar made oath before me that he deposited in the post office of San Francisco, this 13th day of July, A. D. 1854, a certified copy of the complaint, with the amendments thereto, in the above-entitled action, together with a copy of the summons; and that said copies of the complaint, amendment, and summons were directed to —— Gray, infant daughter of Franklin C. Gray, deceased, to the care of Matilda C. Gray, her mother, Brooklyn, New York.

ISAAC J. WISTAR.

Sworn to before me this 13th day of July, 1854.

[SEAL.] E. L. BENSON, *Not. Pub.*

61 Filed July 13th, 1854.

R. C. HOPKINS, *D. Cl'k.*

Amendment to complaint.

Fourth judicial district court.

WILLIAM H. GRAY
vs.
CORNELIUS J. EATON and JOSEPH C. PALMER, administrators of Franklin C. Gray, dec'd, Matilda Gray, and James Gray.

The plaintiff states that he heretofore filed a complaint in the above-entitled action, to which he refers. He states that Matilda C.

Gray, the widow of Franklin C. Gray, deceased, has, since the filing of said complaint, borne a female child, which is the offspring of said deceased, and entitled to a share of his estate; that said child is an infant, about — months old, and resides with her mother at Brooklyn, in the State of New York, and is absent from this State. The christian name of said infant is unknown to plaintiff, and he has not been able to ascertain it. He makes said infant a defendant to the above-entitled action, and asks that a guardian may be appointed by the court to appear for said infant. He prays as in the original complaint, &c.

62 CROCKETT, PAGE & TEVIS,
Att'ys for Pl'ff.

STATE OF CALIFORNIA,
County of San Francisco, ss:

This day William H. Gray made oath before me that he is the plaintiff in the above-entitled action, and that the above amendment to the complaint is true, of his own knowledge, except as to the matters which are therein stated on his information on belief, and as to those matters he believes it to be true.

SAN FRANCISCO, *June* 26, A. D. 1854.

W. H. GRAY.

Sworn and subscribed before me.

JOSEPH GRANT,
Notary Public.

Endorsed: Filed June 27th, 1854.

JOHN C. CORBETT, *D. Cl'k.*

Answer of guardian.

State of California, county of San Francisco, district court, 4th judicial district.

WILLIAM H. GRAY
vs.
JOSEPH C. PALMER and CORNELIUS J. EATON, administrators of Franklin C. Gray, dec'd, Matilda C. Gray, widow of F. C. Gray, dec'd, and F. C. Foote, guardian ad litem for Franklina C. Gray, infant daughter of F. C. Gray, dec'd, and James Gray. 63

Henry S. Foote, guardian ad litem for Franklina C. Gray, infant daughter of F. C. Gray, deceased, and one of the defendants in the above-entitled action comes and filed this separate answer to the complaint of said plaintiff, and admits the appointment of Joseph C. Palmer and Cornelius J. Eaton, administrators of Franklin C. Gray, dec'd, and of the issuing of letters of administration thereon, as alleged by plaintiff, and denies all and every the allegations contained in the said complaint, except that above admitted.

H. S. FOOTE,
Attorney, Guardian ad litem, &c.

Endorsed: Filed June 2, 1854.

By J. C. CORBETT, *D. C.*

64 District court, 4th district.

WILLIAM H. GRAY
vs.
JOSEPH C. PALMER & CORNELIUS J. EATON, administrators of Franklin C. Gray, impleaded with Matilda C. Gray and James Gray.

Answer of administrators, and stipulation.

The defendants, the administrators of Franklin C. Gray, above named, answering the complaint in this action, admit their appointment as administrators and the issuing of letters of administration to them, as alleged by the plaintiff, and deny all and singular each and every of the allegations contained in the said complaint, except that above admitted.

CHAS. H. S. WILLIAMS,
Att'y for Administrators.

It is hereby stipulated that the annexed answer may be filed without oath, and that it shall be deemed a sufficient answer and denial, and that the defendants may, under it, give in evidence any facts which they might lawfully give, if separately set up in the answer.

CROCKETT, PAGE & TEVIS,
Att'y for Pl'ffs.

MARCH 29, 1854.

Filed March 30, 1854.

R. C. HOPKINS, *D. C.*

65 District court of the State of California, 4th judicial district.

WILLIAM H. GRAY
vs.
CORNELIUS J. EATON & JOSEPH C. PALMER, administrators of the estate of Franklin C. Gray, Matilda C. Gray, and James Gray.

Answer of M. C. Gray.

CITY AND COUNTY OF SAN FRANCISCO:

Matilda C. Gray, the widow of Franklin C. Gray, deceased, one of the defendants in the above-entitled action, by Henry S. Foote, her attorney, comes into court, and answering the complaint of the above-named plaintiff in this action, admits the appointment of Cornelius J. Eaton and Joseph C. Palmer, as administrators, and the issuing of letters of administration to them, as alleged by the plaintiff, and denies all and every of the allegations contained in the complaint, except that above admitted. The defendant, further answering the said complaint, admits that at the time of the death of her said husband there was no issue of their marriage, but avers that she was at that time enciente, and subsequently gave birth to a female child, the issue of said marriage, by name Franklina C. Gray, which infant child 66 she now claims shall be made a codefendant to this action, and that for the protection of her rights a guardian *ad litem* shall be appointed.

HENRY S. FOOTE,
Att'y for Defendant.
MATILDA C. GRAY.

San Francisco, *October 9th*, 1854,

We hereby stipulate that the above answers may be filed without oath.

CROCKETT, PAGE & TEVIS,
For W. H. GRAY.

October 9th, 1854.

In the district court, fourth judicial district of California, county of San Francisco.

William H. Gray
vs.
Cornelius J. Eaton and Joseph C. Palmer, administrators of the estate of Franklin C. Gray, Matilda C. Gray, and James Gray.

Answer of M. C. Gray.

Respondent Matilda C. Gray, widow of Franklin C. Gray, 67 dec'd, one of the defendants in the above-entitled action, being summoned to answer the complaint of Wm. H. Gray, the plaintiff in said action, proceeds to make answer to said complaint, both the original and supplemental complaint to the latter making her infant child, by her said husband, Franklin C., a party def't to said action.

The said action is instituted, and the said complaint is filed, to partition the estate of said Franklin C. Gray, deceased, between the plaintiff and the defendants, according to their several rights thereto, the plaintiff claiming one equal third part of said estate under a certain copartnership agreement alleged by him to have been made between him and the said Franklin C.

Respondent says that she is the widow of said Franklin C. Gray, dec'd; that since the death of her said husband she has given birth to a female child, Franklina C. Gray, the daughter and only child of said Franklin C., deceased; that the said Franklin C. died intestate, no will of his having thus far been brought to light; that she, as widow and distributee, and the said infant child as distributee and sole heir of said Franklin C., are entitled to his whole estate, real and personal, after payment of debts and expenses of administration.

68 She answers and says that she is wholly ignorant of the pretensions of plaintiff, never having heard her said husband say that said plaintiff was interested in any property held by said Franklin C. On the contrary, she has always been under the impression, from what he did say to her upon the subject, that all property standing in his name was entirely his own.

So far as the facts alleged in plaintiff's complaint aforesaid may be relied upon to affect her interests or the interests of her child in the estate of her said husband, she requires and calls for strict and legal proof of each and every of them. She contests his claim. and insists that the partition and relief he seeks shall not be granted him unless the facts be legally proved by him entitle him legally to relief. She admits nothing, and puts the plaintiff upon proof of his title.

She does not know whether or not the schedule (A) exhibited with the complaint contains a full list of the property left by her said husband, and so far as she may be concerned she requires full and strict proof thereof. And having fully answered, she prays to be dismissed with her costs, &c.

MATILDA C. GRAY.

DISTRICT OF COLUMBIA,
City and County of Washington, ss:

69 Sworn to and subscribed before me on the first day of September, A. D. 1854.

[SEAL.] CHARLES DE SELDING,
Commissioner for the State of California.

Endorsed: Filed Oct. 9, 1854.

T. HAYS, *Clerk*,
per J. VAN NESS, *D. C.*

Answer of C. J. Eaton.

In the district of the fourth judicial district.

WILLIAM H. GRAY, plaintiff,
vs.
CORNELIUS J. EATON and JOSEPH C. PALMER, administrators, of the estate of Franklin C. Gray, deceased, the said Cornelius J. Eaton in his own right, Matilda C. Gray and Franklina C. Gray, infant child of the said Franklin C. Gray, deceased, defendants.

70 The above-named defendant, Cornelius J. Eaton, administrator of the estate of Franklin C. Gray, deceased, as above

stated, for answer to the complaint of the above-named plaintiff, of William H. Gray, as well as such administrator as in his own right, as he is required to answer, says:

I. That he denies specifically, according to his information and belief, the allegation in the first part of the said complaint, to the effect that an agreement of copartnership existed between the said Franklin C. Gray and the plaintiff, whereby the plaintiff has become entitled to one-third part of the said estate.

II. That he denies the allegation that the estate of which the said Franklin C. Gray died seized and possessed is truly set forth in the schedule annexed to said complaint, marked "Exhibit A."

III. That he admits the allegation that letters of administration upon the said estate have been granted by the probate court of San Francisco to him, the said Cornelius J. Eaton, and the above-named Joseph C. Palmer, and that they have duly qualified and taken upon themselves the duties of the said trust as such administrators.

IV. That he admits the allegation that the said Franklin C. Gray died in the month of July of the year 1853; that
71 he had a short time previous married the above-named Matilda C. Gray; that the said Matilda C. Gray has since his death given birth to a female child, the issue of the said marriage, which child, as the defendant, Cornelius J. Eaton, is informed, is called Franklina C. Gray, and is the same child that has been made a defendant to this action by an amendment to the said complaint.

V. And for a further answer to the said complaint, the said def't, Cornelius J. Eaton, says, that the said Franklin C. Gray, in the latter part of the year 1850, in consequence of good and faithful services rendered to him by the said defendant, Cornelius J. Eaton, as clerk in a banking-house, that he, in partnership with Grove Cook McMickle, had in the city of San Francisco, under the firm and style of Gray & McMickle, and as one of the assignees of said firm, after they had surrendered ali their property for the benefit of their creditors, he discharging his duties as such assignee, so as to save a considerable amount of property for the said Franklin C. Gray, without making any charge for his services as such assignee, and also of many acts of friendship which the said Cornelius J. Eaton had done
72 him in lending him considerable sums of money at times when he stood in great need of such aid, and when the said Cornelius J. Eaton, could ill spare it, and otherwise; and also, of his confidence in and knowledge of the integrity, industry, and capacity for business of the said Cornelius J. Eaton, proposed to him, the said Cornelius J. Eaton, that they should form a general partnership, which should embrace all their property and business, upon certain terms and conditions, and for and during a certain length of time; that the said Cornelius J. Eaton accepted the said proposition; that such a partnership was thereupon formed and entered into between them; that the terms of said partnership were afterwards put in writing in a certain agreement, contract, or conveyance, duly signed, sealed, delivered, and acknowledged by the said Franklin C. Gray, and recorded; all of which terms, and other matters and things, by re-

ference to said agreement, contract, or conveyance, which is ready to produce whenever thereunto required, and whereof a correct and duly certified copy is hereunto annexed, marked "Exhibit B," and made a part of this answer, will more fully appear; that the said Franklin C. Gray and the said Cornelius J. Eaton, from and after the formation of the said partnership until the death of the said Franklin C. Gray, carried on all their business in accordance
73 with the same; that since the death of said Franklin C. Gray the said Cornelius J. Eaton, as surviving partner of the said partnership, as administrator as aforesaid, has continued in the possession and management of the entire partnership property; that as soon as the said estate shall be fully administered and the partnership affairs finally settled and closed, he is willing and desirous to surrender such part thereof as belongs to the estate of the said Franklin C. Gray unto such persons as shall be lawfully entitled to receive the same; that besides the one-fourth part of the said partnership property he, the said defendant, Cornelius J. Eaton, has sundry claims on the said estate for considerable sums of money furnished out of said partnership property to the said Franklin C. Gray, for his own individual use and benefit, over and above his share of the sums, whereof the above-mentioned sums of money were portions.

VI. That the estate of which the said Franklin C. Gray died seized and possessed, or otherwise well entitled to, is truly and fully set forth in the paper hereto annexed, and made a part of this answer, marked on the back of the last page "Exhibit C," being a true copy of the inventory and appraisement of the said estate, now of
74 record in the probate court of the county of San Francisco.

Wherefore, the said defendant, Cornelius J. Eaton, prays that so much of the partnership property aforesaid as belongs to him may be adjudged, and decreed, and confirmed to him, in order that he may be enabled to enjoy his own property, without further annoyance, inconvenience, and expense; that partition of the entire property may be made between all the parties to this action, first allotting to the said defendant, Cornelius J. Eaton, his share of the same, to wit: one-fourth part thereof; that the affairs of the said partnership may be finally settled and closed up; that in such settlement he may be allowed credits for all such sums or amounts as shall be appear to be justly to him; and finally, he may be hence dismissed with such costs and disbursements as he may be entitled to by law, for such cost, inconvenience, and trouble as he has been or may be subjected to by his defence in his behalf.

GLASSELL & LEIGH,
Attorneys for the said defendant, Cornelius J. Eaton.

Affidavit.

STATE OF CALIFORNIA,
County of San Francisco, ss:

Cornelius J. Eaton, the above-named defendant, being duly
75 sworn, says that he has read the foregoing answer and knows the

contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief; and as to those matters, that he believes it to be true

C. J. EATON.

Subscribed and sworn to this 3rd day of November, in the year of our Lord 1854, before me.

JOHN C. CORBETT, *D. C.*

Exhibit B.

This indenture, made and entered into this the first day of January, A. D. one thousand eight hundred and fifty-one, by and between Franklin C. Gray, party hereto of the first part, and Cornelius J. Eaton, party of the second part, both of the city of San Francisco, State of California, witnesseth: That the said party of the first part, for and in consideration of the following conditions, and for the further consideration of the sum of one dollar, to him in hand paid by the said party of the second part, the receipt whereof is
hereby acknowledged, hath this day granted, bargained, sold,
76 and delivered to the said party of the second part, the undivided one-fourth right and interest in and to all the property, both real and personal, of which the said party of the first part is now possessed of, or may hereafter be within the time for which this instrument is executed. The conditions are as follows, viz:

The word "hereafter" interlined and noted before signing.

First. The said Eaton agrees and binds himself to remain with the said Gray for the term of two years from the first day of January, A. D. one thousand eight hundred and fifty-one, at which time a division of all property, real and personal, shall take place, unless both parties should wish to remain longer together, that is to say: one-fourth to the said Eaton, and the remaining three-fourths to the said Gray.

Second. The said Eaton shall unite all the funds he may become possessed of in the joint fund for the purpose of accumulation.

Third. All outstanding debts shall be paid out of the joint fund held against the said party of the first part.

Fourth. Both parties to this instrument shall have the privilege of visiting the States, and all expense thereby incurred shall be charged to the party so making them, and settled accordingly, at the
77 expiration of the said term.

Fifth. Should the connection be dissolved by the death of either of the parties, the affairs shall be closed in the following manner: If dissolved by the death of the said Eaton, his heirs shall receive from the said Gray the sum of one thousand dollars per month for his services, from the 1st day of January, A. D. 1851, until the time of his decease; and if by death of the said Gray, the said Eaton shall, for settling up the estate of the said Gray, receive the full amount of the contract, as fully as if the time had been completed.

In witness whereof, the said party of the first part has hereunto set his hand and seal on the 6th day of September, A. D. 1851.

F. C. GRAY. [SEAL.]

Attest:
JAS. C. L. WADSWORTH.

STATE OF CALIFORNIA,
County of San Francisco, ss:

On this sixth day of September, A. D. 1851, before me, a notary public in and for said county, personally appeared the above-named F. C. Gray, to me known to be the person described in and who executed the foregoing instrument, and acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

78 Witness my hand and official seal.

HENRY H. HAIGHT,
Notary Public, San Francisco.

A true copy of the original, recorded August 16th, 1853, at 2 p. m., at request of C. J. Eaton.

CHA'S R. RUSSUM,
County Recorder,
[SEAL.] *Per* JOHN A. CLARK, *Deputy.*

COUNTY OF SAN FRANCISCO,
County Recorder's Office.

I hereby certify that the foregoing is a full, true, and correct copy of record deposited and remaining in this office, as will appear by reference to iber 26 of Deeds, page 287.

[SEAL.] Witness my hand and official seal this 28th of April, A. D. 1854.

JAMES GRANT, *County Recorder,*
P. JOHN A. CLARK, *Deputy.*

79 *A list of notes and other personal property belonging to the estate of Franklin C. Gray, dec'd, and Corl's J. Eaton.*

Note.	J. Louis Thompson....	dated 2nd Oct'r, 1852	$150 00	Doubtful.
"	A. Gorham..........	" 18th Nov'r, 1852	150 00	Good.
"	Gray & Starr.........	" 1st July, 1853	500 00	Doubtful.
"	Gray & Starr.........	" 19th Feb'y, 1852	3, 086 89	do.
"	William H. Gray......	" 23rd March, 1853	2, 600 00	do.
"	H. M. Lewis..........	" 22nd Nov'r, 1853	500 00	Good.
"	H. M. Lewis..........	" 22nd Nov'r, 1853	500 00	Good.
"	F. R Schaeffer........	" 6th March, 1850	224 00	Worthless.
"	F. A. Longacre......	" 16th Jan'y, 1850	100 00	Worthless.
"	Edward Love........	" 24th Jan'y, 1850	400 00	do.
"	James S. Treanor.....	" 18th Jan'y, 1850	600 00	do.
"	James Hyslop........	" 11th Oct., 1850	800 00	do.
"	Richard Larrimore....	" 16th Oct'r, 1850	400 00	do.
"	Richard Larrimore....	" 16th Oct'r, 1850	400 00	do.

Note.	A. S. M. Duffie........	dated 15th Feb'y,	1850	$100 00	Worthless.
"	James Errard........	" 9th Sept'r,	1852	500 00	do.
"	S. M. Sweeney........	" 6th July,	1851	35 00	do.
"	William A. Browne....	" 21st April,	1850	100 00	do.
"	E. M. Jarvis..........	" 15th Jan'y,	1850	110 00	do.
"	Jno. F. Simmons......				
"	Robert Haley.........	" 17th Dec'r,	1849	5,000 00	Doubtful.
"	John Hanley.........				
"	E. R. Clay............	" 9th Oct'r,	1849	332 00	Worthless.
"	W. F. Swasey	" 4th Jan'y,	1850	400 00	do.
"	Thos. W. Harper......	" 1st Dec'r,	1849	283 50	do.
"	A. Brown	" 14th Feb'y,	1850	200 00	do.
"	E. M. Jarvis..........	" 25th Oct'r,	1849	400 00	do.
"	B. Schlessinger.......	" 25th Nov'r,	1849	110 00	do.

80 Three-fourths of the above-mentioned notes and bills belong to the estate of Franklin C. Gray, dec'd, and one-fourth to Cornelius J. Eaton, surviving partner.

Also the following note and draft, which may belong exclusively to the estate of F. C. Gray, deceased, the same having been charged to him during his lifetime upon the books of Gray & Eaton, viz:

Note: H. O. Gagtud, dated 19th Oct'r, 1852, for $200—$200.
Draft: J. J. Bryant, " 12th March, 1853, " 1,060.

Also, the undivided three-fourths of the following claims, judgments, &c., the remaining fourth being claimed and owned by Corn's J. Eaton, viz:

Judgment against Jno. B. Steinberger, dated 8th day of June, 1850, for $\$14,543\frac{20}{100}$, with interest at $12\frac{1}{2}$ per cent. per month thereon until paid.—Nothing.

Also, a claim of said Gray, dec'd, against the government of the United States, in the hands of Mr. Constine, resident in the city of Washington.—$3,000.

Also, a claim of one Volney Ostrander, assigned to Gray and Chambers, also in the hands of said Constine for collection. T. J. A. Chambers is entitled to one-half of said claim of Volney Ostrander. —$200.

81 Also, a suit of said Gray, dec'd, against the estate of Samuel Anderson, dec'd, in the State of Illinois, in which Mr. Peck, of Chicago, is attorney for said Gray, dec'd.—Doubtful.

Also, the undivided three-eighths interest in the following building materials and merchandise, $\frac{1}{8}$th of which belong to C. J. Eaton and one-half to T. J. A. Chambers, consisting as follows, to wit:

214 Johnston's patent rolling iron shutters; 100 casks nails; 1 lot of hardware; 400 squares tin roofing; 1 lot of lumber; 1 lot of lathes; a lot of paints and oils.—$6,000.

Also, the undivided three-fourths interest in a certain interest held in the name of F. C. Gray, dec'd, and as will more fully appear by reference to a certain agreement made between F. C. Gray, James Johnson, John B. Frisbie, and George W. Wright, and also to another agreement made between F. C. Gray, James Johnson, and George Wright, both of which agreements were entered into on the first day of November, A. D. eighteen hundred and fifty-two, for the purchase and prosecutions against the government of the United States, made by Col. John C. Frémont during his command in California, to wit:

82	One-half claim of	Salvador Vallejo	of	$53, 100
	Four-fifths “ “	do. do.	“	53, 100
	All “ “	Ignacio Pacheco	“	5, 540
	“ “ “	Marcus Varca	“	4, 967
	“ “ “	Francisco Castro	“	3, 045
	“ “ “	Vincente Martinez	“	5, 050
	“ “ “	J. Joses Vallejo	“	2, 825
	“ “ “	J. Francisco Arce	“	5, 000
	“ “ “	Bruno Bernal	“	10, 750
	“ “ “	Francisco Branch	“	1, 250
	“ “ “	José Bereyeza	“	5, 595
	“ “ “	Victor Castro	“	12, 912 50
	“ “ “	Maria Josepha Sanchez	“	9, 030
	“ “ “	Juan B. Alvarado	“	11, 605
	“ “ “	Joaquin B. Castro	“	8, 516
	“ “ “	Juan B. Burnell	“	5, 750
	“ “ “	V. P. Gomez	“	11, 321 20
	“ “ “	Santiago Duckworth	“	3, 950
	“ “ “	J. Benito Diaz	“	1, 505
	“ “ “	Pedro Burquez	“	3, 375
	“ “ “	Gabriel de la Torre	“	2, 575
	“ “ “	Francisco Pico	“	2, 950
	“ “ “	Vicente Esparanza	“	2, 285
	“ “ “	Rafael Gonzalez	“	26, 000
	“ “ “	Francisco Maraga	“	3, 320
	“ “ “	Bernardina Garcia	“	1, 375
	“ “ “	Juan Castro	“	20, 000
	“ “ “	Alexander Mesa	“	4, 220
	“ “ “	Mariano Merando	“	4, 405
	“ “ “	Pancho Garcia	“	1, 535
	“ “ “	Mariano Soberanes	“	19, 930 50

If collected, the sum of.............................$210, 000

83 *A list of real property belonging to the estate of F. C. Gray, dec'd.*

	Other owners.	App. value.
The undivided $\frac{3}{4}$ of the northeast corner of Pacific and Dupont st's, 58 feet on Pacific street by $114\frac{1}{2}$ on Dupont street, being part 500 vara lot 166.	Remaining fourth owned by C. J. Eaton, surviving partner.	$12,000
The undivided $\frac{3}{4}$ of southeast corner Stockton and Vallejo st's, $137\frac{1}{2}$ feet on Vallejo str., by 68 feet on Stockton st., being the north half 50 vara lot No. 92.	.........do..........	9,000
The undivided $\frac{3}{4}$ of water lot No. 625.	........do..........	4,000
do. $\frac{3}{4}$ do. do. 630.	........do..........	5,000
do. $\frac{3}{4}$ do. do. 635.	........do..........	6,000
do. $\frac{3}{4}$ do. do. 641.	........do..........	3,500
do. $\frac{3}{4}$ do. do. 759.	........do..........	3,000
The undivided $\frac{3}{4}$ of lot on Pacific st. cont'g $167\frac{1}{2}$ west of NW. cor. Pac. and Kearney streets, $36\frac{1}{2}$ ft. on Pacific by 50 varas in depth.	........do..........	4,000
The undivided $\frac{3}{4}$ of 50 vara lot No. 49, western addition.	........do..........	Nothing.
The undivided $\frac{3}{8}$ of 50 vara lot No. 463, official map.	Rema'ing $\frac{5}{8}$ of these lots owned by T. J. A. Chambers, C. J. Eaton.	2,000
The undivided $\frac{3}{8}$ of 50 vara lot No. 494, official map	........do..........	1,500
The undivided $\frac{3}{8}$ of 50 vara lot No. 515, official map.	........do..........	1,500
The undivided $\frac{3}{8}$ of 50 vara lot No. 516, official map.	........do..........	2,000
84 The undivided $\frac{3}{8}$ of 100 vara lot No. 145, south beach.	$\frac{5}{8}$ owned by Palmer, Jones & Eaton.	2,000
The undivided $\frac{3}{8}$ of 50 vara lot No. 1520, north beach.	Cook & Eaton......	1,800
The undivided $\frac{3}{8}$ of 50 vara lot No. 1521, north beach.	$\frac{5}{8}$ owned by Cook, Jones & Eaton	2,250
The undivided $\frac{3}{8}$ of beach and water lot No. 210.	$\frac{5}{8}$ owned by Chambers & Eaton	12,000
The undivided $\frac{3}{16}$ of the southeast cor. of Washington and Kearney st's, 34 ft. 4 in. on Kearney st. by 70 ft. on Washington street, and building known as the El Dorado.	$\frac{13}{16}$ owned by Chambers, Johnson, McCabe, & Eaton.	25,000
The undivided $\frac{3}{16}$ lot on the west side of Dunbar alley, $83\frac{1}{2}$ feet south of Washington street, 64 by 23 feet, and building known as Red Robin.	$\frac{13}{16}$ owned by Chambers, Johnson, McCabe, & Eaton.	2,000
The undivided $\frac{3}{4}$ lot on Pacific street commencing 58 ft. east of the NE.	One fourth owned by Eaton.	8,000

	Other owners.	App. value.
corner Pacific and Dupont streets, 51 feet 10 in. on Pacific street by 137½ feet in depth, being part No. 66.		
The undivided ¾ lot east side Dunbar alley 53½ feet south of Washington street, 28 feet front by 23 feet in depth.	........do..........	1,600
Mortgage for $8,200 with int. at 2¼ per ct. per mo. ¾ lot on Ohio street, containing 97½ feet from the corner of Broadway, 25 feet front by 60 feet in depth, pat. No. 197, east side.	........do..........	1,000
¾ lot on Broadway street, 137½ feet east SE. cor. Montgomery st., 17 feet front and by 57 feet in depth.	........do..........	150
The undivided ¾ of 2,552 acres of land lying in the county of Contra Costa, known as the Alamo valley, being part of the Amador ranch.		$5 per acre.
The undivided ¾ of two leagues of land lying in the county of Sutter, known as the Vernon rancho.		$5 per acre.
The undivided ⅜ of 6 town lots in the town of Marysville, viz:		
Lot No. 2, block 14, range G, " " 6, " 14, " G, " " 7, " 14, " G, " " 4, " 10, " H, " " 2, " 12, " L, " " 3, " 12, " L, ...	⅝ of these lots owned by the estate of J. W. McCabe, J. E. & Con. J. Eaton.	$1,000

86 Note.—Judge A. Gorham, of this city, has an agreement with the deceased that the effect that when he shall pay one-half of the cost and expenses of the Alamo valley interest at 2½ per cent. per month, the said Graham shall have a deed for the undivided half of the said land; and the undivided three-fourths of two leagues of land in Sutter county is owned by Gilbert A. Grant, Frank R. Starr, and William H. Gray—that is to say, they each shall be entitled to an undivided fourth of the same when they shall pay to the estate of said Gray and C. J. Eaton the cost thereof, with interest at 2½ per cent. per month.

We hereby certify that we have faithfully appraised the estate of Franklin C. Gray, dec'd, and that the within is a true exhibit of the same as exhibited to us.

(Signed)

R. E. WOODS.
A. A. SELOVER.
GEO. FLEMING.

State of California,
County of San Francisco, ss:

We do solemnly swear that we will truly, honestly, and impartially appraise the property which shall be exhibited to us, according to the best of our knowledge and ability, of the estate of Franklin
87 C. Gray, deceased.

(Signed)
A. A. SELOVER.
R. E. WOODS.
GEO. FLEMING.

Sworn before me this 28th day of March, 1854.
DENNIS LYONS, *Dep. Cl'k.*

Statement of the effects of the estate of Franklin C. Gray, deceased.

Notes good	1, 150	
doubtful	11, 336 89	
worthless	5, 444 50	
Draft good	200 00	
		18, 231 39
Claims, judgments, &c., if collected, valued at		49, 200
Real estate valued at		169, 600
		$237, 031 39

Endorsed: Filed Nov'r 3rd, 1854.
JOHN C. CORBETT, *D. C.*

Remittitur.

88 In the supreme court of the State of California, October term, A. D. 1855.

William H. Gray, respondent,
vs.
Cornelius J. Eaton, *et als.*, appellants.

On appeal from the district court of the fourth judicial district in and for the county of San Francisco.

And now, at this day, this cause being called, and having been heretofore argued and submitted, and taken under advisement by the court, and all and singular the law and the premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Justice Heydenfeldt, Justice Bryan concurring, to the effect that the appeal from the court below be dismissed.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here, that the appeal from the district court of the fourth judicial district in and for the county of San Francisco in the above-entitled cause be, and the same is hereby dismissed with costs.

89 I, J. R. Beard, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the first day of October, A. D. 1855, and now remaining of record in my office.

[SEAL.] Witness my hand and the seal of the court, affixed at office, this 12th day of October, A. D. 1855.

J. R. BEARD, *Clerk.*

Endorsed: Filed Oct. 13, 1855.

In the district court of the fourth judicial district of the State of California.

WILLIAM H. GRAY, plaintiff,
vs.
CORNELIUS J. EATON and JOSEPH C. PALMER, administrators of the estate of Franklin C. Gray, deceased, the said CORNELIUS J. EATON in his own right, MATILDA C. GRAY and FRANKLINA C. GRAY, defendants; and
90 CORNELIUS J. EATON, plaintiff,
vs.
JOSEPH C. PALMER, administrator of the estate of Franklin C. Gray, deceased, MATILDA C. GRAY, FRANKLINA C. GRAY and WILLIAM H. GRAY, defendants.

Stipulation to Consolidate.

It is hereby stipulated and agreed by and between the several parties to the above-entitled actions, by their respective attornies and representatives, that the said actions may be consolidated into one.

Dated October 23, 1855.

GLASSELL AND LEIGH,
Att'ys for Cornelius J. Eaton.

CROCKETT AND PAGE.
Atty's for W. H. Gray.

W. T. FOOTE,
Guardian ad litem for Franklin C. Gray, and Attorney for M. C. Gray and administrator, &c., &c.

Endorsed: Filed Oct. 23rd, 1855.

HAYES, *Clerk.*

91 *Exhibit A to complaint of Eaton.*

This indenture, made and entered into this the first day of January, A. D. one thousand eight hundred and fifty-one, by and between Franklin C. Gray, party hereto of the first part, and Cornelius J. Eaton, party of the second part, both of the city of San Francisco, State of California, witnesseth that the said party of the first part, for and in consideration of the following conditions, and for the further consideration of the sum of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath this granted, bargained, sold and delivered, to the said party of the second part, the undivided one-fourth right and interest in and to all the property both real and personal, of which the said party of the first part is now possessed of or may hereafter be within the time for which this instrument is executed, the conditions are as follows, viz:

First. The said Eaton agrees to and bind himself to remain with the said Gray for the term of two years from the first day of January, A. D. eighteen hundred and fifty-one, at which time a division of all property real and personal shall take place, unless both parties should wish to remain longer together, that is to say, one-fourth to the said Eaton and the remaining three-fourths to the said
92 Gray.

Second. The said Eaton shall unite all the funds he may become possessed of in the joint fund for the purpose of accumulation.

Third. All outstanding debts shall be paid out of the joint fund held against the said party of the first part.

Fourth. Both parties to this instrument shall have the privilege of visiting the States, and all expenses thereby incurred shall be charged to the party so making them, and settled accordingly at the expiration of the said term.

Fifth. Should the connection be dissolved by the death of either of the parties, the affairs shall be closed in the following manner. If dissolved by the death of said Eaton, his heirs shall receive from the said Gray the sum of one thousand dollars per month for his services, from the first day of January, A. D. 1851, until the time of his decease. and if by the death of the said Gray, the said Eaton shall, for settling up the estate of the said Gray, receive the full amount of this contract, as fully as if the time had been completed.

In witness whereof the said party of the first part has hereunto set his hand and seal on the 6th day of September, A. D. 1851.

Attest. JAS. C. L. WADSWORTH.
F. C. GRAY. [SEAL.]

93 STATE OF CALIFORNIA,
County of San Francisco, ss:

On this sixth day of September, A. D. 1851, before me, a notary public in and for said county, personally appeared the above-named F. C. Gray, to me known to be the person described in, and who executed the foregoing instrument, and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

Witness my hand and official seal.

HENRY H. HAIGHT,
[SEAL.] *Notary Public, San Francisco.*

A true copy of the original, recorded August 16th, 1853, at 2 p. m., at request of C. J. Eaton.

THOS. B. RUSSUM,
County Recorder.
Per JOHN A. CLARK,
Deputy.

COUNTY OF SAN FRANCISCO,
County Recorder's Office.

I hereby certify that the foregoing is a full, true, and correct copy of record deposited and remaining in this office, as will appear by liber H of deeds page 287.

Witness my hand and official seal this 13th day of April, A. D. 1855.

JAMES GRANT,
94 [SEAL.] *County Recorder.*

Endorsed : "Exhibit A."

Schedule referred to in the foregoing complaint and as for "Exhibit B."

That certain piece or parcel of land situate and lying in the city of San Francisco, State of California, commencing at a point on the north line of Pacific street, distant fifty-eight feet east of the northeast corner of Pacific and Dupont streets ; running thence in a northerly direction one hundred fourteen and a half feet ; thence westerly fifty-eight feet ; thence southerly along Dupont street one hundred fourteen and a half feet, and thence easterly along Pacific street fifty-eight feet to the place of beginning.

Also, that certain parcel of land in the city of San Francisco aforesaid, commencing at a point on the north line of Pacific street, distant fifty-eight feet east of the northeast corner of Pacific and Dupont streets ; running thence easterly fifty-one feet and ten inches along Pacific street ; thence northerly one hundred thirty-seven and a half feet ; thence westerly fifty-one feet and ten inches ; and thence southerly one hundred and thirty-seven feet to the place of beginning. 95

Also, that certain parcel of land lying in the city of San Francisco aforesaid, commencing at a point on the north line of Pacific street, distant one hundred thirty-seven and a half feet west of the northwest corner of Pacific and Kearney streets; running thence in a westerly direction along Pacific street twenty-six and a half feet ; thence northerly one hundred thirty-seven and a half feet ; thence easterly twenty-six and a half feet ; and thence southerly one hundred thirty-seven and a half feet to the place of beginning, the same being the most easterly part of 50 vara lot numbered forty-eight (48) on the official map of said city.

Also, that certain parcel of land lying in the said city of San Francisco, commencing at a point on the east line of Stockton street, distant sixty-eight feet and nine inches south of the southeast corner of Stockton & Vallejo streets ; running thence northerly along Stockton street sixty-eight feet and nine inches ; thence easterly along Vallejo street one hundred thirty-seven and a half feet ; thence southerly sixty-eight feet and nine inches ; and thence westerly one hundred thirty-seven and a half feet to the place of beginning, the same
96 being the north half of 50 vara lot numbered (92) ninety-two.

Also, that tract of land numbered six hundred and twenty-five upon the official map of San Francisco, having a front of forty feet and ten inches by one hundred thirty-seven and a half feet in depth.

Also, lot numbered seven hundred and fifty-nine, fronting on Spear street, same dimensions.

Also, lots numbered upon the aforesaid map six hundred and thirty, (630,) six hundred and thirty-five, (635,) and six hundred and forty-one, (641;) each of said lots having a front of forty-five feet and ten inches on Mission street, by one hundred and thirty-seven and a half feet in depth.

Also, that certain parcel of land, commencing twenty feet from the southwest corner of lot numbered one hundred and ninety-seven on the map of said city; running thence northerly twenty feet; thence easterly fifty-two feet to Ohio street; thence southerly along Ohio street twenty feet, and thence westerly fifty-two (52) feet to the place of beginning.

Also, that certain parcel of land, commencing at the northwest corner of lot one hundred and twenty-seven on the said map; running thence easterly on Broadway street seventeen feet; thence southerly fifty-seven and a half feet; thence westerly seventeen feet;
97 thence northerly fifty-seven and a half feet to the place of beginning.

Also, that certain tract of land lying in said city, commencing at a point distant fifty-three and a half feet south of the southeast corner of Washington street and Dunbar alley; running thence southerly along said alley twenty-eight feet; thence easterly twenty-three feet; thence northerly twenty-eight feet, and thence westerly twenty-three feet to the point of beginning.

Also, fifty vara lot in the western addition, numbered forty-nine, on the northwest corner of Bay and Larkin streets.

Also, the undivided one-fourth of that certain tract or parcel of land, commencing at a point on the east line of Kearney street, distant thirty-four feet and a half inches south of the southeast corner of Washington and Kearney streets; running thence northerly along Kearney street thirty-four feet four and a half inches; thence easterly along Washington street seventy feet; thence southerly thirty-four feet and four and a half inches, and thence westerly seventy feet to the place of beginning, being the same lot on which the building known as the "El Dorado" now stands.

Also, the undivided one-fourth of that certain parcel of land, com-
mencing at a point distant eighty-one feet and a half south of the
SW. corner of Washington street and Dunbar alley; running
98 thence southerly along Dunbar alley fourteen feet; thence
westerly twenty-three feet; thence northerly fourteen feet,
and thence easterly twenty-three feet to the point of beginning,
being the same lot on which the building known as the Red Robin
now stands.

Also, the undivided half of that certain tract of land lying on the southeast corner of Sansome and Pacific streets, being known as the original beach and water lot numbered forty (40) on the official map of San Francisco.

Also, the undivided one-half of those certain fifty vara lots in the block bounded by Mason, Powell, Lombard, and Greenwich streets, numbered upon the official map four hundred and ninety-three, four hundred and ninety-four, five hundred and fifteen, and five hundred and sixteen.

Also, the undivided half of those certain lots situate on north Beach and numbered upon said map fifteen hundred and twenty, and fifteen hundred and twenty-one.

Also, the undivided one-half of that certain lot on south Beach, and numbered upon said map one hundred and forty-five of the 100 vara lot survey.

All the foregoing real estate is situate, lying and being in the city of San Francisco, California.

Also, that certain tract of land situate, lying and being in the
county of Contra Costa, Cal., containing twenty-five hundred and
fifty-two acres, more or less, known as the Alamo valley, and
99 being part of the Amador ranch.

Also, an undivided interest in that tract of land, containing two leagues, more or less, and lying in the county of Sutter, Cal., and known as the Vernon ranch.

Also, the undivided one-half of six town lots in the town of Marysville, California, viz: No. 2 in block 14, range G; No. 6 in block 14, range G; No. 7 in block 14, range G; No. 4 in block 10, range H; No. 2 in block 12, range L; and No. 3 in block 12, range L.

Together with all and singular the tenements, hereditaments and appurtenances hereunto belonging or in anywise appertaining, and the rents, issues and profits thereof.

Promissory	note.	J. Louis Thompson	dated	2nd Oct'r,	1852	150	00
"	"	A. Gorham	"	18th Nov'r,	1852	150	00
"	"	Gray & Starr	"	1 July,	1853	500	00
"	"	William H. Gray	"	19 Feb'y,	1852	3,086	89
"	"	H. M. Lewis	"	23 March,	1853	2,600	00
"	"	F. B. Schaeffer	"	22 Nov'r,	1853	500	00
"	"	F. A. Longacre	"	16 Jan'y,	1850	100	00
"	"	Edward Love	"	21 "	1850	400	00

	"	"	James L. Treanor........	"	18 "	1850	600	00
	"	"	James Hyslop...........	"	11 Oct.,	1850	800	00
	"	"	Richard Larrimore.......	"	16 "	1850	400	00
	"	"	do. do.	"	16 "	1850	100	00
	"	"	A. S. M. Duffie..........	"	15 Feb'ry,	1850	100	00
	"	"	James Everhard........	"	9 Sept'r,	1852	500	00
	"	"	S. M. Jumey...........	"	6 July,	1851	35	00
100	"	"	W. A. Browne..........	"	21 April,	1850	100	
	"	"	E. M. Jarvis...........	"	15 Jan'y,	1850	110	00
	"	"	John T. Simmons........	"	17 Dec'r,	1849	5,000	00
	"	"	Robert Haley............					
	"	"	Jno. Hauley............					
	"	"	E. K. Clay..............	"	9 Oct.,	1849	332	00
	"	"	W. F. Swasey..........	"	4 Jan'y,	1850	400	00
	"	"	Thos. W. Harper........	"	14 Dec'r,	1849	283	50
	"	"	A. Brown	"	14 Feb'y,	1850	200	00
	"	"	E. M. Jarvis...........	"	25 Oct.,	1849	400	00
	"	"	B. Schlessinger..........	"	25 Nov'r,	1849	110	00
	"	"	H. M. Lewis............	"	22 Nov'r	1853	500	00

Judgment.

Judgment.—F. C. Gray & G. C. M'Mickle *vs.* John B. Steinberger, dated the 8th day of June, 1850, for fourteen thousand five hundred and forty-three $\frac{41}{100}$ dollars with interest at $12\frac{1}{2}$ per cent. per month until paid.

Claims.

Claim.—F. C. Gray *vs.* the Government of the United States, in the hands of Constine, resident in the city of Washington.

Claim of Volney Ostrander, assigned to Gray and Chambers, also in the hands of said Constine.

Also, the undivided one-third of the half of the claim of Salvador
Vallejo *vs.* the Goverment of the United States, contracted
101 by and under the authority of Col'l Jno. C. Frémont, during
his command in California. Am't of the whole claim is
$53,000, fifty-three thousand dollars.

Also, three-tenths of the following claims, of the same character as the claim of Salvador Vallejo:

$\frac{4}{5}$ claim	Salvador Vallejo................................	$53,100	
Claim	Ignacio Pacheco................................	5,540	
"	Marcus Varca..................................	4,967	
"	Francisco Castro...............................	3,045	
"	Vincente Martinez..............................	5,050	
"	J. José Vallejo.................................	2,825	
"	J. Francisco Arce...............................	5,000	
"	Bruno Bernal..................................	10,750	
"	José Bereyeza..................................	5,595	
"	Victor Castro..................................	12,912	50
"	Maria Josefa Sanchez...........................	9,630	
"	Juan B. Alvarado..............................	11,605	
"	Joaquin B. Castro..............................	8,516	
"	Juan B. Burnell................................	5,750	

"	V. P. Gomez	11,321	25
"	Santiago Duckworth	3,950	
"	Francisco Branch	1,250	
"	J. Benito Diaz	1,515	
"	Pedro Basquez	3,375	
"	Garuel De la Torre	2,575	
"	Francisco Pico	2,950	
"	Vicente Esparanza	2,285	
"	Raphael Gonzalez	26,000	
"	Francisco Moraya	3,320	
"	Bernardino Garcia	1,375	
"	José Castro	20,000	
"	Alexander Mesa	4,720	
"	Mariano Mirando	4,405	
"	Pancho Garcia	1,535	
"	Mariano Soberanes	19,930	50
"	Also the whole of the claims of Juan P. Alifero for	11,565	

Also, suit of F. C. Gray *vs.* Estate Samuel Anderson, deceased, in the State of Illinois, in which Peck, of Chicago, is attorney for said Gray, deceased.

102 Also the undivided one-half interest in the following building materials and merchandize, to wit:

214 Johnston's patent rolling iron shutters.
110 cask nails.
400 squares tin.
A lot of lathes.
A lot of hardware.
A lot of lumber, and
A lot of paints and oils.

Also, judgment of Daniel D. Wilson, *et al.*, *vs.* Thomas Sherry, dated 23d July, 1852, for five thousand eight hundred and twenty-three $\frac{99}{100}$ dollars with costs.

Exhibit C.

Claim of Cornelius J. Eaton, surviving partner of Franklin C. Gray, deceased, *vs.* the estate of said deceased, for moneys advanced by said Eaton to said decedent in his lifetime, over and above his share of the partnership funds:

	1851.			
Sept'r	6.	To cash, being $\frac{1}{4}$ of $5,000 applied to his proper use	1,250	
	1852.			
Feb'y	14.	" " " $\frac{1}{4}$ 4,000 " " " " "	1,000	
"	15.	" " " $\frac{1}{4}$ 10,000 " " " " "	2,500	
"	19.	" " " $\frac{1}{4}$ 10,000 " " " " "	2,500	
Nov.	15.	" " " $\frac{1}{4}$ 1,272 80 " " " " "	318	20

103

	1853.			
Jan'y	5.	To cash, being $\frac{1}{4}$ of $92 draft paid Dr. Moneyman	23	
Feb'y	4.	" " " $\frac{1}{4}$ 2,016 " T. J. A. Chambers	504	
"	13.	" " " $\frac{1}{4}$ 125 " Steamer ticket	31	25

M'ch	26.	" " "	¼	141	"	Tobin & Duncan.....	35	25
Ap'l	15.	" " "	¼	1,500	"	Tiffany, Samy & Ellis..	375	
May	21.	" " "	¼	200	"	D. W. Thompson.....	50	
"	25.	" " "	¼	2,000	"	T. O. Larkin.........	1,000	
June	6.	" " "	¼	2,100	"	Burgoyne & Plume...	525	
July	5.	" " "	¼	2,140	"	Do do......	335	
"	12.	" " "	¼	50	"	D. W. Thompson.....	1,250	
"	14.	" " "	¼	1,060	"	J. J. Bryant, and costs.	265	
"	22.	" " "	¼	450	"	exp. sending for J. Gray	100	
"	25.	" " "	¼	450	"	do do do do..	112	50
Aug't	4.	To cash, being	¼ of	3,270	draft	Burgoyne & Plume....	817	50
"	16.	" " "	¼	633⅛	"	drawn from " in N. York	165	97
							$12,120	17

Cr.

1851.

Sept'r 5. By cash being ¾ of $1,800 applied by C. J. Eaton to his private use.............................. 1,350

Balance due.............................. $10,770 17

Interest on the above sums until paid.

Endorsed : Exhibits to complaint of Eaton.

104 *Summons.*

State of California,
County of San Francisco:

In the district court of the fourth judicial district.

Cornelius J. Eaton, plaintiff,
vs.
Joseph C. Palmer, administrator of the estate of Franklin C. Gray, deceased, Matilda C. Gray and Franklina C. Gray, infant child of said Franklin C. Gray, deceased, defendants.

Action brought in the district court of the fourth judicial district, and the complaint filed in the city and county of San Francisco, in the office of the clerk of said district court. The people of the State of California, send greeting to Joseph C. Palmer, administrator, etc., of Franklin C. Gray, deceased, and Franklina C. Gray and Matilda C. Gray. You are hereby required to appear in an action brought against you by the above-named plaintiff, in the district court of the
fourth judicial district, in and for the county of San Francisco,
105 and to answer the complaint filed therein (a copy of which ac-
companies this summons) within 10 days (exclusive of the day of service) after the service on you of this summons, if served within this county, or if served out of this county within forty days, or judgment by default will be taken against you.

9.6

The said action is brought to establish and have adjudicated the rights of plaintiff as a partner of the intestate Franklin C. Gray, and as such to recover and have set apart to plaintiff one-fourth of the estate of said Franklin C. Gray, and also to recover the sum of ten thousand dollars, money due on balance of partnership accounts and for other and further relief. And if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief demanded therein.

Given under my hand and the seal of the district court of the fourth judicial district the sixteenth day of April, in the year of our Lord one thousand eight hundred and fifty-five.

THOMAS HAYES, *Clerk.*
By JOHN C. CORBETT, *Deputy Clerk.*

106 *Aff't of publication.*

STATE OF CALIFORNIA,
County of San Francisco, ss:

John F. Sterling, bookkeeper in the office of the San Francisco Herald, a daily and weekly newspaper published in said city and county, being duly sworn, deposes and says that the notice of which the amended printed notice is a copy, has been published in said paper at least once a week for three months, commencing on the 17th day of April, 1855, and ending on the 17th day of July, 1855.

J. F. STERLING.

Subscribed and sworn before me, this 13th day of Sept'r, 1855.

WM. S. HIGGINS,
Not. Pub.

[SEAL.]

Amendment to complaint.

107 In the district court of the fourth judical district of the State of California, county of San Francisco.

CORNELIUS J. EATON, plaintiff,
vs.
JOSEPH C. PALMER, administrator of the estate of Franklin C. Gray, deceased; MATILDA C. GRAY, FRANKLINA C. GRAY, and, by this amendment, WILLIAM H. GRAY, defendants.

The above-named plaintiff, Cornelius J. Eaton, by way of amendment to the complaint heretofore filed in the above-entitled action, alleges and says as follows:

That he is informed that William H. Gray (the above-named defendant) has or claims an interest, in the matter in controversy in the above-entitled action, adverse to him, the said Cornelius J. Eaton, plaintiff, aforesaid.

That he is informed that the said defendant, William H. Gray, is a necessary party to a complete determination and settlement of the questions involved, and controversy in the said above-entitled action.

108 That he therefore hereby makes the said William H. Gray defendant to the said above-entitled action; and asks that the said defendant William H. Gray be required to appear and answer the complaint hereto filed therein and every part thereof, and also this amendment to the said complaint.

And the said plaintiff asks for the relief demanded in the said complaint heretofore filed, as well against the parties defendant thereto to the said complaint therein named, as against the said defendant William H. Gray.

GLASSELL & LEIGH,
Att'ys for the Pl'ff.

Endorsed: Filed Oct'r 23, 1855.

HAYS, *Clerk.*

Answer of the above-named, defendant Joseph C. Palmer, adm'r, &c.

In the district court of the fourth judicial of the State of California.

CORNELIUS J. EATON, plaintiff,
vs.
JOSEPH C. PALMER, administrator of the
109 estate of Franklin C. Gray, deceased; MATILDA C. GRAY, and FRANKLINA C. GRAY, defendants.

The above-named defendant, Joseph C. Palmer, administrator of the estate of Franklin C. Gray, deceased, for answer to the complaint of the above-named plaintiff, in the above-entitled action, says that he denies each and every, all and singular, the allegations in said complaint contained.

H. S. FOOTE,
Attorney for said Defendant.

JOSEPH C. PALMER,
Adm'r, etc.

Endorsed: Filed Sept'r 13, 1855.

HAYES, *Clerk.*
By JNO. E. CORBETT, *D. Cl'k.*

Answer of the above-named defendant, Matilda C. Gray.

In the district court of the fourth judicial district of the State of California.

CORNELIUS J. EATON, plaintiff,
vs.
110 JOSEPH C. PALMER, administrator of the estate of Franklin C. Gray, deceased; MATILDA C. GRAY, and FRANKLINA C. GRAY, defendants.

The above-named defendant, Matilda C. Gray, for answer to the complaint of the above-named plaintiff in the above-entitled action, says that she denies each and every, all and singular the allegations in said complaint contained.

H. S. FOOTE,
Attorney for said defendant, Matilda C. Gray.

Endorsed : Filed Sept'r 13, 1855.

HAYES, *Clerk,*
By JAS. C. CORBETT, *D. Cl'k.*

111 *Answer of F. C. Gray.*

In the district court of the fourth judicial district of California.

Cornelius J. Eaton, plaintiff,
vs.
Joseph C. Palmer, administrator of the estate of Franklin C. Gray, deceased, Matilda C. Gray, and Franklina C. Gray, defendants.

Answer of the above-named defendant, Franklina C. Gray, by Henry S. Foote, her guardian *ad litem.*

The above-named defendant, Franklina C. Gray, by Henry S. Foote, her guardian *ad litem*, duly appointed to appear for the said defendant, who is an infant under the age of fourteen years, and defends this action on her own behalf, says:

That by her said guardian *ad litem* denies each and every, all and singular, the allegations in the complaint of the above-named plaintiff, in the above-entitled action contained.

HENRY S. FOOTE,
Guardian ad litem for the said Franklina C. Gray, in pro. per.

Endorsed: Filed Sept'r 15, 1855.

HAYES, *Clerk,*
By JOHN C. CORBETT, *Dep. Cl'k.*

112 *Stipulation making W. H. Gray a party def't.*

In the district court of the fourth judicial district of the State of California.

Cornelius J. Eaton, plaintiff,
vs.
Joseph C. Palmer, administrator of the estate of Franklin C. Gray, deceased, Matilda C. Gray, and Franklina C. Gray, defendants.

Stipulation.

It is hereby stipulated and agreed, by and between the parties to the above-entitled action and William H. Gray, that the said William H. Gray may and shall be made a party defendant to the above-entitled action by the filing of an amendment to the complaint heretofore filed therein for that purpose.

Dated October 22, 1855.

GLASSELL & LEIGH,
Att'ys for C. J. Eaton.
CROCKETT & PAGE,
Att'ys for W. H. Gray.
H. S. FOOTE,
Guardian ad litem and attorney for M. C. Gray, and administrator, &c., &c.

Endorsed : Filed Oct'r 23, 1855.

HAYES, *Clerk.*

113 *Answer of W. H. Gray.*

In the district court of the fourth judicial district of the State of California.

CORNELIUS J. EATON, plaintiff,
vs.
JOSEPH C. PALMER, administrator of the estate of Franklin C. Gray, deceased, *et als.*, defendants.

The defendant, William H. Gray, for answer, as well to the original complaint herein as to the amendment thereto, states:

That the plaintiff, Cornelius J. Eaton, has no interest, such as represented by him in his complaint, in the estate therein mentioned, nor has he any other interest in the said estate, and he denies the execution of the instrument, "Exhibit A," relied on by the said Eaton to show his partnership.

That he has exhibited his interest in said estate pending in this court against the said Eaton and his co-defendants, Joseph C. Palmer, administrator, &c., and others, and he relies upon his complaint and the proceedings in the said action, and makes them part of
114 this answer, and prays as in his complaint aforesaid.

CROCKETT & PAGE,
Att'ys for W. H. Gray.

Endorsed: Filed Oct'r 23rd, 1855.

Titles of the actions.

In the district court of the fourth judicial district of the State of California.

Action 1.

William H. Gray, plaintiff,
vs.
Cornelius J. Eaton and Joseph C. Palmer, administrators of the estate of Franklin C. Gray, deceased, the said Cornelius J. Eaton in his own right, Matilda C. Gray and Franklin C. Gray, defendants ; and—

Action 2.

Cornelius J. Eaton, plaintiff,
vs.
Joseph C. Palmer, administrator of the estate of Franklin C. Gray, deceased, Matilda C. Gray, Franklin C. Gray, and William H. Gray, defendants.

115

Decree.

Commenc't of decree.—Partnership betw. H. C. Gray and C. J. Eaton.

The above-entitled actions having been consolidated into one, and having come on to be heard, the court doth order, adjudge, and decree that during the lifetime of Franklin C. Gray, deceased, there existed between the said Franklin C. Gray and Cornelius J. Eaton a partnership, commencing on the first day of January, in the year one thousand eight hundred and fifty-one, and ending on the —— day of July, in the year of our Lord one thousand eight hundred and fifty-three, on which last-mentioned day the said Franklin C. Gray died, which partnership embraced all the property, real and personal, and all the business of them, and each of them, the said Franklin C. Gray and the said Cornelius J. Eaton, and in which partnership the said Franklin C. Gray had an interest of three-fourths, and the said Cornelius J. Eaton had an interest of one-fourth.

Interest of Eaton.

And the court doth further order, adjudge, and decree that the said Cornelius J. Eaton have, and receive accordingly, one-fourth interest in the said partnership, and the profits and property thereof.

Partnership betw. F. C. Gray and W. H. Gray.

And the court doth further order, adjudge, and decree that
116 during the lifetime of the said Franklin C. Gray there also

existed between the said Franklin C. Gray and William H. Gray a partnership, commencing on the ——— day of ——————— in the year one thousand eight hundred and ———, and ending on the ——— day of July, in the year one thousand eight hundred and fifty-three, on which day the said Franklin C. Gray died, as aforesaid, which partnership embraced all the property, real and personal, all the business of them, and each of them, the said Franklin C. Gray and the said William H. Gray, and in which partnership the said Franklin C. Gray had an interest of two-thirds, and the said William H. Gray an interest of one-third.

Partnership betw. F. C. Gray and W. H. Gray, subject to partnership betw. F. C. Gray and E. J. Eaton.

And the court doth further adjudge, order, and decree that the said partnership between the said Franklin C. Gray and William H. Gray was, and is, subject to the said partnership of and between the said Franklin C. Gray and the said Cornelius J. Eaton; so that upon a dissolution and settlement of the said partnership between the said Franklin C. Gray and the said Cornelius J. Eaton, the said Cornelius J. Eaton was, and is, entitled to have and receive one-fourth interest therein, and in the property thereof and profits as aforesaid, 117 as if the said partnership between the said Franklin C. Gray and the said William H. Gray had never existed.

Profits and property of partnership between F. C. Gray & C. J. Eaton.

And the court doth further adjudge, order, and decree that the profits and property of the said partnership between the said Franklin C. Gray and the said William H. Gray are and consists of the three-fourths interest in the profits and property of the said partnership between the said Franklin C. Gray and Cornelius J. Eaton, after deducting from the profits and property of the said partnership the one-fourth interest therein of the said Cornelius J. Eaton, as aforesaid.

Interest of W. H. Gray.

And the court doth further adjudge, order, and decree, that the said William H. Gray have and receive one-third interest accordingly in the said partnership between the said Franklin C. Gray and the said William H. Gray, and the profits and property thereof, as aforesaid.

Interest of M. C. Gray and F. C. Gray in remaining property.

And the court doth further adjudge, order, and decree, that Matilda C. Gray and Franklina C. Gray, widow and surviving infant child of the said Franklin C. Gray, are respectively entitled to, and each of them, respectively, have and receive one half of the interest in the said partnerships whereunto the said Franklin C. Gray

would be entitled if he were still living, and the profits and
118 property thereof, after deducting from the said partnership
the respective interests therein of the said Cornelius J. Eaton
and the said William H. Gray, aforesaid.

Administrator of F. C. Gray to pay to persons entitled money in his hands.

And the court doth further adjudge, order, and decree, that Joseph C. Palmer, administrator of the estate of Franklin C. Gray, deceased, pay to the persons, and in such proportions as such persons are herein before adjudged, ordered, and decreed to be entitled thereto, all sums of money which are now or may hereafter come into his hands as such administrator, on account of the profits and property of both or either of the said partnerships, after the accounts of the said partnerships shall have been taken and settled, as hereinafter directed.

Commissioner appointed to take ac'ts.—Each party to be charged with all sums, &c., received, etc., by him.

And the court doth further adjudge, order, and decree, that it be, and it is hereby, referred to James D. Thornton, an attorney and counsellor of this court, who is hereby appointed a commissioner, and invested with all lawful and proper authority for that purpose, to take and state the following accounts, that is to say: First. An account of
all the business, dealings, transactions, profits, and property
119 of the said partnership between the said Franklin C. Gray
and Cornelius J. Eaton. Second. An account of all the business, dealings, transactions, profits, and property of the said partnership between the said Franklin C. Gray and the said William H. Gray. Third. An account of all sums of money of the said partnerships, both or either of them, appropriated to the use, or expended on account of the said Matilda C. Gray and the said Franklina C. Gray, both or either of them; and fourth. An account of the profits and property of the said partnership, with a statement of the amount of the interests therein of the said Cornelius J. Eaton, the said William H. Gray, and the said Matilda C. Gray, respectively, as the same shall appear on the taking and stating of said accounts, in which accounts the said Franklin C. Gray, the said Cornelius J. Eaton, the said Matilda C. Gray, the said Franklina C. Gray, and the said William H. Gray, are to be charged respectively with all sums of money or other property of the said partnership, both or either of them, received by, or expended on account of either of them respectively.

Produce books, deeds, &c.—And to be examined on oath.—Commiss'r to make report.

For the better clearing of which accounts the parties to the said
actions are to produce before the said commissioner, upon
120 oath, if so required by either or any of the other parties to

the said action, all books, deeds, papers, vouchers, and writings in their keeping, or under their control, relating to the said accounts, either or any thereof, and are to be examined on oath by the said commissioner touching any matter or matters relating to the said accounts, either or any thereof, as the said commissioner may require; and the said commissioner shall make report of his actings and doings in his behalf with all convenient speed, and particularly of the said accounts when so stated and taken with any matter or matters specially stated, deemed pertinent by himself, or required by any or either of the parties to the said actions to be so stated.

Commiss'r to sell for cash.—H. S. Foote represent infant defendant at sale.—Commissioner to accept receipt of any of the parties.—Commissioner to report sale.

Sa

And the court doth further adjudge, order, and decree, that the said commissioner, who is hereby appointed and invested with all lawful and proper authority for this purpose, also, after he shall have made such reports as aforesaid, and the same shall have been passed upon by the court, and in accordance with such further directions in this behalf, if any, which the court may give him, do proceed to sell, with all convenient speed, according to law and the 121 rules and practice of this court, as in sales under execution, all the property, real and personal of the said partnerships, both or either of them, of whatever name or nature, for cash; and either or any of the parties to the said action are to be allowed to bid for and become the purchasers or purchaser of any part or parcel of the said property; and Henry S. Foote, guardian *ad litem* of the said infant defendant, Franklina C. Gray, in both of the said actions, is hereby authorized to attend at such sale or sales on behalf of the said infant defendant, and in her name and behalf to bid for and purchase any part or parcel of the said property, and the said commissioner is to accept the receipt or receipts of either or any of the parties to the said action; of also the said Henry S. Foote, guardian *ad litem*, as aforesaid, on behalf of the said infant defendant, Franklina C. Gray, in lieu of cash for the purchase money or price of any part or parcel of the said property to the extent of his or her interest in the said property, as the said interest shall be ascertained by the taking, stating, and settling an 122 account of the same as aforesaid; and the said commissioner is to make a report of such sale or sales with all convenient speed to this court, with any matter or matters specially stated, deemed pertinent by himself, or required by any of the parties to the said actions to be so stated.

Commissioner to execute conveyances, &c.

And the court doth further adjudge, order, and decree, that the said commissioner, after such report of sale shall have been made, and such sale or sales shall have been passed on by the court, do proceed

923

to execute any further directions which the court may give him in this behalf, if any; and that so far and in such instances as the said sale or sales shall have been confirmed and approved by the court, the said commissioner do proceed, upon the compliance of the purchasers or purchaser at such sale or sales with the terms thereof, to make, execute, and deliver to such purchasers or purchaser all legal and proper conveyances, bills of sales, and assignments, as may be requisite to convey, sell, transfer, assign, and set over unto such purchaser or purchasers all the estate, right, title, and interest, as well in law as in equity or otherwise, of any or all of the par-
123 ties to the said action in and to the said property, and every and parcel thereof so sold; the said conveyances, bills of sale, and assignments, to be made, executed, and done at the costs and charges of the said purchasers or purchaser, respectively, and the said commissioners are to make report of their actings and doings in this behalf accordingly.

Com made

And the court doth further order, adjudge, and decree, that after the said conveyances, bills of sale, and assignment, shall have been made, executed, and done according to this decree, and such other and further directions as the court may give in this behalf, as aforesaid, each and every thereof shall be and remain firm, valid, and effectual forever, for the purpose of conveying, settling, setting over, transferring and assigning the said interests of the said parties to the said actions as aforesaid.

JNO. S. HAGER, *Dist. Judge.*

When the above decree was signed it was stated to me in court, by the attorneys or some of them, that the above decree was by the consent and agreement of all the parties thereto. I think Geo. Foote and Given Page, esq're, were present when the statement was
124 made.

Nov'r 29, 1857.

JNO. S. HAGER, *Dist. Judge.*

Endorsed: Filed Oct'r 27th, '55.

HAYES, *Clerk*,
By JOHN C. CORBETT, *D. Cl'k.*

WM. H. GRAY, plaintiff, *vs.* CORNELIUS J. EATON, and JOSEPH C. PALMER, administrator of the estate of Franklin C. Gray, deceased, the said CORNELIUS J. EATON in his own right, MATILDA C. GRAY, and FRANKLIN C. GRAY, defendants.	In 4th dist. court.

And—

Cornelius J. Eaton, plaintiff,
vs.
Joseph C. Palmer, administrator of the estate of Franklin C. Gray, deceased, **Matilda C. Gray**,
124 **Franklina C. Gray**, and **Wm. H. Gray**, defendants.
} In 4th dist. court.

To the honorable John S. Hager, judge of the 4th judicial district of the State of California:

The undersigned, appointed a commissioner by a decree of this honorable court dated 27th October, 1855, to take and state certain accounts therein mentioned in the above stated cases, and to report the same to the court, having performed the duties assigned to him with such despatch as he could, submits the following as his report:

The accounts required to be taken by the decree are as follows:

"First. An account of all the business, dealings, transactions, profits, and property, of the partnership between Franklin C. Gray and Cornelius J. Eaton."

"Second. An account of all the business, dealings, transactions, profits, and property, of the said partnership between the said Franklin C. Gray and the said Wm. H. Gray."

"Third. An account of all sums of money of the said part-
126 nerships, both or either of them, appropriated to the use, or ex-
pended on account of the said Matilda C. Gray and the said Franklina C. Gray, both or either of them."

"Fourth. An account of the profits and property of the said partnership, with a statement of the amounts of the interest therein of the said Cornelius J. Eaton, the said Wm. H. Gray, the Matilda C. Gray, and the said Franklina C. Gray, respectively, as the same shall appear in the taking and stating of the said accounts, in which accounts the said Franklin C. Gray and the said Wm. H. Gray are to be charged, respectively, with all sums of money or other property of the said partnerships, both or either of them, received by or expended on account of either of them, respectively." Which accounts the undersigned proceeded to take after due notice to the attornies of the various parties, and they are herewith presented to the court in the exhibits annexed to this report.

It is proper to state, in the commencement, that on motion Cornelius J. Eaton and Wm. H. Gray were ordered to produce before the undersigned as commissioner all books, deeds, papers, and vouchers
and writings in their keeping or under their control, relating
127 to the said accounts, either or any of them, which were accord-
ingly produced before the said commissioner by the said Cornelius J. Eaton and Wm. H. Gray. The statement and accounts herewith reported are made up principally from the evidence furnished by the books produced.

The exhibits hereto annexed, marked from A to E, both inclusive, are statements showing all the business, dealings, transactions, profits and property of Franklin C. Gray and Cornelius J. Eaton.

Exhibit A is a statement of moneys properly chargeable to F. C. Gray, received from the El Dorado saloon, from the 1st of January, 1851, to 16th August. 1853, amounting to $\$106{,}929\,\frac{00}{100}$.

It should be stated here that the business now before us was carried on in the name of Franklin C. Gray—Eaton's name not appearing in the style of the firm. The statement is made up to the 16th August, 1853, because the books were kept as those of F. C. Gray until that date, at which time the death of F. C. Gray [which actually occurred on or about the 15th of July preceding] became known to Eaton at San Francisco.

128 Exhibit B is a statement of various sums of money properly chargeable to F. C. Gray, received from sundry sources between 1st of January, 1851, and 16th August, 1853, am't $76,719 86.

Exhibit C is a statement of sums of money disbursed by F. C. Gray for various objects of expenditure on account of the partnership between Eaton and himself, for which said Gray is entitled to credit amounting to $\$123{,}044\,\frac{87}{100}$.

Exhibit "D" is a general statement of the business of Gray & Eaton from January 1, 1851, to August 16, 1853, showing the total profits of the said business, amounting to $\$85{,}074\,\frac{19}{100}$; of this sum the said exhibit shows Franklin C. Gray's $\frac{3}{4}$ to be $\$63{,}805\,\frac{64}{100}$. C. J. Eaton's $\frac{1}{4}$ $\$21{,}268\,\frac{55}{100}$.

Exhibit "E" is a statement of the notes, real and personal property, of all claims, &c., belonging to the said partnership of F. C. Gray & Eaton.

Exhibit "F" shows the amount received, respectively, by F. C. Gray, C. J. Eaton, and William H. Gray, from the partnership of Gray & Eaton, and appropriated to their own individual use. The sums received by them, with the cash on hand at the death of F. C. Gray, amounting to $8,894, make up the sum of the profits of
129 the business of Gray & Eaton. The annexed Exhibits, numbered from 1 to 4, both inclusive, together with Exhibits 8 and 9 and E, show the business, dealings and transactions and property of the partnership as between Franklin C. Gray and Wm. H. Gray. William H. Gray was a partner of F. C. Gray from some time during the fall of 1850, and prior to Eaton's becoming a partner. Franklin C. Gray and Wm. H. Gray were interested in two other concerns besides the one carried on in the name of F. C. Gray. The two firms were F. C. Gray, Brothers & Co., and Gray & Starr. The concern of Gray & Starr met with heavy losses, as will be seen, and Starr became insolvent, the liabilities of this concern thus falling on F. C. and Wm. H. Gray.

Exhibit "1" is a statement showing the amount of money received from various sources by Franklin C. Gray, and properly chargeable to him prior to 1st January, 1851, in which William H. Gray has an interest of one-third. The amount received was $20,952.

Exhibit "2" is a statement of the outstanding liabilities of the concern of Gray & Starr, amounting to the sum of $7,558 27. The books

of Gray & Starr show a debit to the account of profit and loss of $\$23{,}973\frac{24}{100}$, and outstanding liabilities, above referred to in
130 Exhibit "2." The same exhibit shows available assets to the
concern of Gray and Starr, amounting to $\$1{,}828\frac{05}{100}$, and a debt of Wm. H. Gray to the concern of Gray, Bro. & Co., amounting to $\$1{,}861\frac{17}{100}$. In these two last-named concerns the undersigned understands the decree as holding that the respective interests of F. C. Gray and Wm. H. Gray are two-thirds, and one-third.

Exhibit 3 is a statement of the sums of money received and disbursed by the administrators of F. C. Gray since his death, embracing a period from the 16th August, 1853, to the 19th December, 1855, taken from the accounts of the administrators during that period, viz., the account of the special administrators, Wm. H. Gray and Eaton, of Palmer and Eaton, adm'r of Joseph C. Palmer, administrator de bonis non, which said accounts are herewith returned, marked X Y Z.

From these accounts it appears that the whole amount received by the administrators during this entire period was $\$51{,}130\frac{31}{100}$, including a balance of $\$491\frac{44}{100}$, now in hands of Joseph C. Palmer, adm'r. The same accounts likewise show the amounts disbursed by the administrators to be $\$50{,}638\frac{87}{100}$; of this sum disbursed
131 there was paid out for account of partnership demands the
sum of $\$29{,}321\frac{53}{100}$, for account of estate of F. C. Gray, dec'd, (including $6,300 paid Mrs. Matilda C. Gray, and commissions allowed Palmer,) the sum of $\$20{,}964\frac{95}{100}$, for account of Wm. H. Gray $100, and for account of C. J. Eaton $\$252\frac{39}{100}$, and a balance remaining in the hands of Palmer, adm'r, of $\$491\frac{44}{100}$, of which a separate statement is hereafter made.

Exhibit 8 is a statement of sums of money disbursed by the administrators of F. C. Gray, dec'd, since the 16th August, 1853, for account of the estate of said decedent, the aggregate amount of which is $\$20{,}964\frac{95}{100}$.

Exhibit 9 is a statement of sums of money disbursed by adm'rs of F. C. Gray, dec'd, since the 16th August, 1853, for joint account of estate of said decedent and Wm. H. Gray, as well as for individual accounts of Wm. H. Gray and C. J. Eaton, and showing balance in the hands of Joseph C. Palmer, adm'r, to be $\$491\frac{44}{100}$. These Exhibits 8 and 9 are made up from the accounts of the administrators, herewith returned, and are designed to show the items charged to each party and vouchers to sustain them; the vouchers are
132 herewith returned, numbered from 2 to 15, both inclusive. It
may be here stated that the commisssions allowed Palmer, $\$288\frac{77}{100}$, are four per cent. on $\$7{,}219\frac{66}{100}$, amount received by him since he has been sole administrator.

From the foregoing Exhibit 4 may be readily understood, which is a statement of an account between the estate of F. C. Gray and Wm. H. Gray, showing the result of all the transactions between F. C. Gray and his estate and Wm. H. Gray. This account shows a balance due Wm. H. Gray of $\$25{,}207\frac{14}{100}$. The first two items on the debit side of this account explain themselves. The third is a payment made by Wm. H. Gray (by giving his note therefor and relieving the concern) of an account of the firm of Gray & Starr to G. B. Post & Co., for $3,346, two-thirds of which, $2,230 67, is properly chargeable to estate of F. C. Gray, a voucher for which payment is herewith returned, marked 1.

The fourth item is $\frac{1}{3}$ of $\$356\frac{81}{100}$, amount of F. C. Gray's individual indebtedness to Gray & Starr, as appears from Exhibit 2. The fifth is $\frac{1}{3}$ of the amount received by administrators of F. C. Gray, since his death, and disbursed for account of his estate, and
for Eaton and Wm. H. Gray, (not including the balance of
133 $\$491\frac{44}{100}$, now in hands of administrator,) amounting to
$\$21,317\frac{34}{100}$, after deducting therefrom $\$6,670\frac{50}{100}$, leaving $\$14,646\frac{84}{100}$, to $\frac{1}{3}$ of which Wm. H. Gray is entitled. (Wm. H. Gray's share of the $\$6,670\frac{50}{100}$, just mentioned, has been allowed him in the general division of the business of Gray and Eaton, and in the item of $8,894, of cash on hand, see Exhibit D.)

The items on the credit side of this account, (the items here called items of credit, are the sums of money received by Wm. H. Gray of F. C. Gray, during his lifetime, and of his adm'rs since his death,) may be readily comprehended by referring to Exhibit Q, as to the first and second items, and to Exhibit D, as to the fourth item. Where the bills receivable are estimated as so much money, they being due by and to partners, Wm. H. Gray is charged with the sums due by him to F. C. Gray as so much rec'd. The third item on this side of the account is the amount of capital furnished by F. C. Gray to Wm. H. Gray, placed by the latter in the concern of Gray & Starr, with which the said Wm. H. Gray is chargeable, and
it is here placed to the credit of the estate of F. C. Gray.
134 The last item is the sum of $100, paid him as per his receipt
by Palmer, adm'r. The result of these transactions shows an indebtedness by the estate of F. C. Gray to Wm. H. Gray of $\$25,207\frac{17}{100}$.

Exhibit E, above mentioned, is a list of all the property, notes, claims, demands, judgments, &c., belonging to the partnership of F. C. Gray and C. J. Eaton. In this property Wm. H. Gray is interested to the amount of one-third of the interest of Franklin C. Gray, that is to say, *one-third of three*-fourths or one-fourth of the whole.

Exhibit 5 shows the amount of $6,300, as received by Mrs. Matilda C. Gray since the death of F. C. Gray, paid to her by the administrators, as appears from their accounts, which see. It does not appear that the infant, Franklina C. Gray, has received anything.

Exhibit 6 is an account showing the indebtedness of est. of F.
C. Gray to C. J. Eaton, the amount of which indebtedness is
135 $\$11,279\frac{31}{100}$. It will be seen from this account that the
amount received by Eaton from the partnership of Gray & Eaton is $\$9,736^{85}$, made up of $\$7,513\frac{35}{100}$, received prior to 16th August, 1853, and $\$2,223\frac{50}{100}$, being one-fourth of the cash in hand ($8,894) at the death of F. C. Gray, retained by Eaton, (the administrators only receiving and accounting for the remaining three-fourths, $\$6,670\frac{50}{100}$,) and since the death of F. C. Gray he has also

received $\$252\frac{39}{100}$, paid him by Palmer, adm'r, with the exception of this single item of $\$252\frac{39}{100}$; Eaton has received $\frac{1}{4}$ of the money collected from the partnership assets on property, and has paid one-fourth of the debts, therefore his account, with the exceptions above noticed, has not been continued beyond the 16th of August, 1853. The balance due him is not changed by thus stating the account.

Exhibit 7 is a general statement answering the requisition of the
fourth account made by the decree, and is intended to show an ac-
count of the profits and property of the partnership, with a statement
of the amounts of the interests therein of Cornelius J. Eaton,
136 Wm. H. Gray, Mrs. Matilda C. Gray, and Franklina C. Gray,
so far as they have any, in which account Franklin C. Gray,
Cornelius J. Eaton, Matilda C. Gray, Franklina C. Gray, and Wm.
H. Gray have charged to them all sums of money received by them
from the partnerships, and appropriated to their own use, or ex-
pended on account of each of them, respectively. The amounts of
the interests of Matilda C. Gray and Franklina C. Gray, in the as-
sets of these partnerships, so far as concerns the money realized from
them, (which is only embraced in his statement,) are not given, be-
cause Franklin C. Gray before his death, and his administrators since,
have received largely more than they were entitled to, leaving the
estate now in debt to the partners, Wm. H. Gray and C. J. Eaton,
to the amount of $\$36,486\frac{45}{100}$, which must be paid before Matilda C.
Gray or Franklina C. Gray should have any share.

The amount of money received from the various sources, according
to this exhibit, (not including the $\$491\frac{44}{100}$, balance in hands of adm'r,)
amounts to $\$128,577\frac{93}{100}$. The shares of the parties are as follows:
$\$71,824\frac{94}{100}$ to est. of F. C. Gray; \$21,268 55 to C. J. Eaton, and
$\$35,484\frac{44}{100}$ to Wm. H. Gray. F. C. Gray received in his life-
137 time, and his administrators, since his death, the sum of
$\$108,311\frac{39}{100}$; C. J. Eaton has received, per Exhibit 6, the sum
of $\$9,989\frac{24}{100}$; and Wm. H. Gray, per Exhibit 4, $\$10,277\frac{30}{100}$, which,
added together, makes the sum of $\$128,577\frac{93}{100}$. It also appears from
the same exhibit that there is a balance due by the est. of F. C.
Gray of $\$36,486\frac{45}{100}$, and that there is due to C. J. Eaton a balance
of \$11,279 31, and to Wm. H. Gray a balance of \$25,207 14, which
added together make up the sum due by the est. of F. C. Gray, to
wit, $\$36,486\frac{45}{100}$. In this exhibit may likewise be found a division
of the balance of $\$491\frac{44}{100}$, between Wm. H. Gray and the estate of
F. C. Gray, $\frac{1}{3}$ to the former and $\frac{2}{3}$ to the latter. The exhibit con-
cludes with a statement similar to the first one made in it, including
the balance, $\$491\frac{44}{100}$, above noticed. It shows the whole amount re-
ceived to be $\$129,069\frac{37}{100}$, to be distributed as follows: to estate of
F. C. Gray, $\$72,152\frac{57}{100}$; to C. J. Eaton, $\$21,268\frac{55}{100}$; and to Wm.
H. Gray, $\$35,648\frac{25}{100}$. The balance due by estate of F. C. Gray is
$\$36,650\frac{26}{100}$, being the sum of the balances due Eaton and Wm H.
Gray, of which $\$11,279\frac{31}{100}$ is due the former, and $\$25,370\frac{95}{100}$
138 is due the latter, and this should be the division, as the estate
is so largely in debt to the other parties, Eaton and Wm. H.
Gray.

The amount received by Mrs. Matilda C. Gray of $6,300 is included in the sum charged to the est. of F. C. Gray. In any future divisions which may take place between Mrs. Gray and her infant child, Franklina C. Gray, it may be estimated.

The property in hand can be seen by reference to Exhibit E, and is estimated to be worth the sum of $100,000. The two notes of H. M. Lewis, of $\$500\frac{10}{100}$ each, included in this statement, have been paid, as will be seen by reference to the special adm'rs, Gray & Eaton, and should not be estimated as assets. The building materials, merchandise, &c., have likewise been sold in part, and are accounted for by the administrators. See their accounts, &c. It is proper to state that the vouchers for the accounts of Wm. H. Gray and C. J. Eaton, special adm'rs, and of Palmer and Eaton, adm'rs, are on file in the court of probate for the county of San Francisco, the said accounts having been passed and allowed by that court; for this reason the said vouchers do not accompany the report. The vouchers of Palmer, sole adm'r, are herewith returned.

The commissions allowed Palmer were four per cent. on
139 $\$7,219\frac{66}{100}$ received by him, as adm'r, from the 1st day of
March, 1855, to the 19th December, 1855; but as one-third of this sum belonged to Wm. H. Gray, the proper sum upon which commissions should be allowed would be $\frac{2}{3}$rds of $\$7,219\frac{66}{100}$, which is $\$4,813\frac{11}{100}$; the commissions would then amount to $\$192\frac{52}{100}$, and the balance then remaining in hands of adm'r would be $\$587\frac{71}{100}$, which, divided between Wm. H. Gray and F. C. Gray, gives to the former his one-third in amount, $\$195\frac{90}{100}$, and to the latter two-thirds remain, amounting to $\$391\frac{81}{100}$, charging the estate of F. C. Gray with this balance of $\$587\frac{71}{100}$, as it is in the hands of the administrators of the estate, allowing to the estate the $\frac{2}{3}$rds due it, and to Wm. H. Gray his one-third; then it would be seen that the estate has received over and above its share of these moneys the sum of $\$36,650\frac{26}{100}$, corresponding in amount to the balances due Eaton and Wm. H. Gray, viz: $\$11,279\frac{31}{100}$, plus $\$25,370\frac{95}{100}$, equal to $\$36,650\frac{26}{100}$, showing same result as above. See last statement in Exhibit 7.

There have been presented and proved by the subscribing witnesses thereto to the undersigned two contracts, or articles of agreement, [copies of which are herewith returned, marked 10 and
140 11,] executed on the 1st of November, 1852, to which F. C.
Gray, James Johnson, George W. Wright, and John B. Frisbie, are parties; all of them to 10, and the three first named to 11; which last was executed on the same day subsequently to the first, as it refers to 10, as having been signed by all the above-named persons. Upon the last contract above mentioned, No. 11, it would be seen that the estate of F. C. Gray has a claim against the said George W. Wright for four equal fifteenth parts of all moneys and expenses advanced by F. C. Gray, in his lifetime, for the purchase of claims against the government of the United States, in pursuance of the first contract [10] above referred to, and likewise for whatever portion of one-third part of the money advanced by said Gray in the purchase of one-half of a claim of Salvador Vallejo *vs.* the same

government, the said sums of money to be reimbursed to said Gray within two years from the date of the contract, [1st November, 1852,] by the said Wright, with interest at a reasonable rate: provided, that the claims referred to in said articles of agreement shall not sooner, that is, before the expiration of the two years aforesaid, be allowed and paid by the government of the United 141 States, and in case of partial allowance and payment thereof by the said government, then that the parties shall settle with each other according to the provisions of the said contract 10; that is, dividing the receipts, the expenses having been first paid. There appears to have been advanced as above by F. C. Gray, in the purchase of the claim of S. Vallejo, the sum of $2,500, one-third of which is $\$833\frac{33}{100}$, and in costs and expenses of other claims, the sum of $12,310, four-fifteenth of which are $\$3,282\frac{87}{100}$, thus making the entire claim of the estate against the said Wright amount to $4,116, which seems now to be due and unpaid, "with interest at a reasonable rate" from the 1st November, 1852.

It will be seen from the testimony of Joseph C. Palmer, hereto attached, marked 12, that there has been allowed on the Vallejo claim the sum of $11,700; for more particular information concerning this reference may be had to the testimony, Exh. 13, contains the testimony of C. J. Eaton. The testimony of Palmer and Eaton, taken by the undersigned, is returned as a part of the proceedings had before him as commissioner.

142 All of which is respectfully submitted.

(Signed) JAMES D. THORNTON,
Commissioner.

MARCH 1st, 1856.

ACCOUNT 1ST.—*A.*

Statement of moneys properly chargeable to Franklin C. Gray, rec. from the El Dorado saloon, from the 1st of January, 1851, *to* 16*th August,* 1853.

1851.			
March	1st.	This sum received being profits for three months from December, 1850	7, 863
April	1st.	To this sum received to date	1, 998
May	1.	" " " "	4, 754
June	1.	" " " "	8, 535
July	1.	" " " "	6, 217
August	1.	" " " "	3, 132
Sept'r	1.	" " " "	2, 315
October	1.	" " " "	4, 741
Dec'r	1st.	" " " "	6, 028
"	31st.	" " " "	2, 200
1852.			
January	31.	" " " "	3, 382
April	30.	" " " "	7, 219
May	31.	" " " "	2, 884
June	30.	" " " "	2, 732
August	31.	" " " "	5, 138

September	30.	To this sum received to date	3, 839
October	31.	" " " "	3, 062
143			
November	30.	" " " "	3, 036
December	31.	" " " "	921
1853.		"	
January	31.	" " " "	3, 809
February	28.	" " " "	4, 042
March	31.	" " " "	3, 382
April	30.	" " " "	1, 485
		Carried forward	$92, 714
		Amount brought forward	$92, 714
1853.			
May	31st.	To this sum received to date	4, 293
June	30.	" " " "	533
July	30.	" " " "	5, 029
August	16.	" " " "	4, 360
			$106, 929

B.

Statement of sums of money properly chargeable to Franklin C. Gray, received from sundry sources, between the 1st of January, 1851, *and August the* 16*th,* 1853.

		To this sum, being profits rec'd on Pacific wharf, properly being leasehold estate from Clark, Gray, & Vassault	$20, 083	38
		To this sum, being profits on Pacific wharf stock, for books of Vassault	1, 240	
144 1861.				
January	31.	To cash received of sheriff on ac of judgment of Gray against Carr, &c	1, 255	50
1852.				
July	8.	To this sum, profit on sale of O. S. Hazard's note.	445	60
August	26.	To cash rec'd for one-half claim of V. O. Strand.	113	85
1853.				
March	15.	To this sum, cash received of T. A. Longacre..	150	
		To cash rec'd for rent of lot on Pacific street..	300	
		To rents rec'd from March 1, 1852, to August 16, 1853, for books of C. J. Eaton	16, 940	25
		To rents rec'd from Jan'y 1, 1851, to March 1, 1852, to wit: for lot NE. cor. Dupont and Pacific streets, E. L. Morgan, tenant	1, 700	
		To rent of lot on north side of Pacific street bet. Kearney and Dupont, F. Salmon, tenant for 14 months, at $125 per month	1, 750	
		To rent of beach and water lot No. 40 from May 1, 1851, to March, 1852	3, 500	
		Rent of State marine hospital, collected in Oct'r, 1852	2, 700	
			$50, 178	58

145		To	rent of 50 vara lot, 43, from 30th April to the 6th of June, 1851	522	50
		"	Rent of lot on Battery street, Charles Minturn tenant, for seven months, from 1st of January, 1851	1,050	
		"	Rent of part of 50 vara lot, No. 66, on Pacific street, for six months, from January 1, 1851, to Richard Larrimer, at $100 per mo.	600	
		"	This sum being amount to credit of interest ac. from 1st March, 1852, to 16th August, 1853	1,825	33
		"	This sum being cash received on ac. of the sale of stocks, profits on said sale	4,368	45
1852.					
July	11.	"	Cash rec'd of Lewis & Marks for part of 50 vara lot, No. 43	2,100	
1853.					
January	9.	"	Cash rec'd of H. M. Lewis for part of same lot	375	
February	7.	"	Cash rec'd of same, for same	500	
June	8.	"	" " " "	500	
July	16.	"	" " Travers "	5,000	
1851.					
February	26.	"	Cash rec'd of J. A. Chambers for part of lot No. 66	3,700	
146		"	Bills payable for note to G. W. Denins, int. 2 per cent. per month, date 25 April, 1853, $2,000. Note to same, dated 25th May, '53, $1,000. Note to John Cowell, date 11th July, 1853, 1,000. Note to John W. Righter, date 16th April, 1853, with int. 2 per cent. per month, $2,000	6,000	
				$76,719	86

C.

Statement of sums of money disbursed by Franklin C. Gray for various objects of expenditure, ac. of the partnership between C. J. Eaton and himself, for which said Gray is entitled to credit.

1851.					
February	1.	By	cash paid W. S. Clark, rent on lot cor. of Broadway and Battery streets, Illinois House	660	
March	1.	"	Cash paid same for same	250	
May	1.	"	" " " "	500	
April	4.	"	Cash paid judgm't in favor of R. S. Dove	1,000	
"	26.	"	Cash paid judgment in favor of Emile Daughney	6,642	
May	1.	"	Cash paid judg't in favor of Smith & Stevenson	387	40
147	June 6.	"	Bill in favor of Joseph Galloway	1,000	
	July 26.	"	" p'd Independent Pacific Fire Co'y	100	
May	27.	"	Cash p'd court costs in Gray vs. Butler & Co	58	50

June	17.	By Cash p'd court costs in Gray *vs* Graham, &c	37	90
August	12.	" Bill p'd Theodore Payne for sale of the Mickle lot	205	45
February	25.	" Cash paid Samuel Gallagher, per order	725	
May	24.	" " " execution Hayden *vs.* Graham, Gray, &c	2,681	42
March	1.	" Cash paid George S. Pettibone, note of July 10th, 1850	10,000	
March	1.	" cash paid balance of in't on same from October 10th, 1850	2,333	
Dec'r	17.	" cash paid judgment of H. Smith *vs.* F. C. Gray, and others	589	45
		Carried forward	$27,170	12
1852		Brought forward	$27,170	12
Feb'y	15.	By cash paid court costs in Gray *vs.* McCarty	50	
"	20.	" " " McDougall fees for rec't	285	
Oct'r	14.	" " " for telegraph stocks	1,000	
March	1.	" " " sundry expenses to August 16, 1853, as per Eaton's books	3,836	85
"	19.	By cash advanced J. A. McDougall	100	
October	9.	" " " E. D. Baker	425	
August	30.	" " " for merchandize	18,013	45
June	28.	" " paid ½ judgm't of Leech & West	2,537	42
November	23.	" " " note H. O. Gaylon	200	
148 Nov'r	17.	By cash advanced for Frémont claims	16,020	35
		" " to C. J. Eaton	7,513	35
1853 August	16.	By cash paid Bonneville, balance of open account due him	51	42
1852. Dec'r	14.	By cash paid judgm't in Dewey *vs.* Whipple, Gray, &c	8,961	52
		" cash paid costs in Sutter Smith *vs.* Gray	14	
1853. August	15.	" cash on hand this day paid over to C. J. Eaton, administrator	8,894	
		" cash paid State, county, and city taxes for 1851 & '2	750	
1851. March	24.	" cash paid E. P. Jones for Beach & Water lot, No. 40	3,500	
"	3.	" cash paid same for undivided halves of 50 vara lots, No's 493, 494, 515 & 516	2,500	
1852. September	30.	" cash paid James Gallagher for water lots, No's. 625, 630, 635, 641, & 769	2,500	
		Carried to next page	$104,322	48

149		Brought from preceding page..........	$104, 322	48
1852.				
Oct'r	7.	By cash paid fund commissioners for undivided ½ of 100 vara lot, No. 145................	1, 050	
"	7.	By cash paid for undivided ½ 50 vara lot, No. 1520....................................	400	
		" cash paid for 50 vara lot, No. 1521........	500	
March	10.	" " Luther Pearson, in part for 50 vara lot, No. 66, for lot on Dunbar alley, bet. Washington & Merchant; lot on Broadway and for lot on Ohio street...............	615	
June	10.	" cash paid on ac. of same property........	615	
Dec'r	10.	" " "	615	
		" " for Alamo ranch, pr. books of C. J. Eaton..................................	3, 265	50
		" cash paid for Vernon ranch, for books of C. J. Eaton...............................	3, 500	
1853.				
August	4.	" cash paid T. Salmon for one-half of house on Pacific st..................................	1, 325	
1852.				
November	18.	" bills receivable, to wit: note of A. Gorham, $150; note of James Everard, $500; note of Gray & Starr, dated 19th of February, 1852, with interest 3 per cent. per month for $3, 086 89; note of same bearing date 1st July, 1853, for $500; note of W. H. Gray, dated 23rd March, 1853, with int. at 3 per c't per month of 2, 600....................	6, 836	89
			$123, 044	87

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D.

General statement of the business of Gray & Eaton, from January 1, 1851, *to August* 16, 1853, *showing the total profits of the said business.*

Amount received by Franklin C. Gray, as appears from Exhibit A.	$106, 929	
Am't rec. by same, as appears from Exhibit B.............	76, 619 86	
		183, 648 86
Am't rec'd by C. J. Eaton..................		7, 513 35
Cash on hand at the death of Franklin C. Gray, credited to him and paid over to the special administrators..................................		8, 894
		$200, 056 21
Off this amount disbursed for ac. of the partnership, by Franklin C. Gray..............		123, 044 87
		$77, 011 34

Add amount due on following notes, bills receivable on hand at the death of F. C. Gray, int. on same calculated to the 15th July, 1853, on which day F. C. Gray died.

	A note of Gray & Starr for $3, 086 89, dated February 19, 1852, with interest from date at 3 per cent. per month		4, 661 25
	Note of same for same, dated 1st July, 1853.		500
	Carried forward		$82, 172 59
151	Brought forward		$82, 172 59
	Note of Wm. H. Gray to F. C. Gray, of 23rd March, 1853, due six months after date, int. 3 per cent. per month		2, 901 60
	Total profits		85, 074 19
	F. C. Gray's $\frac{3}{4}$ths	$63, 805 64	
	C. J. Eaton's $\frac{1}{4}$th	21, 268 55	
		$85, 074 19	
	Of this sum of $85, 074 19—		
	F. C. Gray rec'd	$64, 044 83	
	C. J. Eaton rec'd	7, 513 35	
	Wm. H. Gray	4, 622 01	
	Cash on hand 16th Aug't, 1853	8, 894	
			$85, 074 19

E.

A list of real property, notes and other personal property belonging to the partnership of Franklin C. Gray, dec'd, and C. J. Eaton.

That certain piece or parcel of land situate and lying in the city of San Francisco, State of California, commencing at a point on the north line of Pacific street, distant fifty-eight feet east of the northeast cor., of Pacific and Dupont streets; running thence in 152 a northerly direction one hundred fourteen and a half feet; thence westerly fifty-eight feet; thence southerly along Dupont street one hundred fourteen and a half feet; and thence easterly along Pacific street, fifty-eight feet to the place of beginning.

Also, that certain parcel of land in the city of San Francisco, afores'd commencing at a point on the north line of Pacific street distant fifty-eight feet east of the northeast corner of Pacific and Dupont streets; running thence easterly fifty-one feet & ten inches along Pacific street; thence northerly one hundred thirty-seven and a half feet; thence westerly fifty-one feet and ten inches; and thence southerly one hundred thirty-seven and a half feet to the place beginning.

Also, that certain parcel of land lying in the city of San Francisco, aforesaid, commencing at a point on the north line of Pacific street, distant one hundred and thirty-seven and a half feet west of the northwest corner of Pacific and Kearney streets; running thence in a westerly direction along Pacific street twenty-six and a half

153 feet ; thence northerly one hundred thirty-seven and a half feet; thence easterly twenty-six and a half feet ; and thence southerly one hundred thirty-seven and a half feet to the place of beginning, the same being the most easterly part of 50 vara lot numbered forty-eight [48] on the official map of said city.

Also, that certain parcel of land lying in the said city of San Francisco, commencing at a point on the east line of Stockton street, distant sixty-eight feet and nine inches south of the southeast corner of Stockton and Vallejo streets ; running thence northerly along Stockton street sixty-eight feet nine inches, thence easterly along Vallejo street, one hundred and thirty-seven and a half feet, thence southerly sixty-eight feet and nine inches ; and thence westerly one hundred and thirty-seven and a half feet ; thence southerly sixty-eight feet and nine inches ; and thence westerly one hundred thirty-seven and a half feet to the place of beginning, the same being the north half of 50 vara lot numbered [92] ninety-two.

154 Also, that tract of land numbered six hundred and twenty-five upon the official map of San Francisco, having a front of forty-five and ten inches, by one hundred and thirty-seven and a half feet in depth.

Also, lot numbered seven hundred and fifty-nine, fronting on Spear street, same dimensions.

Also, lot numbered upon the aforesaid map six hundred and thirty, 630. Six hundred and thirty-five, 635, and six hundred and forty-one, 641, each of said lots having a front of forty-five feet and ten inches on Mission street, by one hundred thirty-seven and a half feet in depth.

Also, that certain parcel of land commencing twenty feet from the southwest corner of lot numbered one hundred and ninety-seven on the map of said city ; running thence northerly twenty feet ; thence easterly fifty-two feet to Ohio street ; thence southerly along Ohio street twenty feet ; and thence westerly fifty-two, 52, feet to the place of beginning.

Also, that certain parcel of land commencing at the north-
155 west corner of lot No. one hundred and ninety-seven on the
said map ; running thence easterly on Broadway street seventeen feet ; thence southerly fifty-seven and a half feet ; thence westerly seventeen feet ; and thence northerly fifty-seven and a half feet to the place of beginning.

Also, that certain tract of land lying in said city, commencing at a point distant fifty-three and a half feet south of the southeast corner of Washington street and Dunbar alley ; running thence southerly along said alley twenty-eight feet; thence easterly twenty-three feet; thence northerly twenty-eight feet, and thence westerly twenty-three feet to the point of beginning.

Also, fifty vara lot in the western addition, numbered forty-nine, on the northwest corner of Bay and Larkin streets.

Also, the undivided one-fourth of that certain tract or parcel of land commencing at a point on the east line of Kearney street, distant thirty-four feet four and a half inches south of the southest corner of

Washington and Kearney streets; running thence northerly
156 along Kearney street, thirty-four feet four and a half inches;
thence easterly along Washington street seventy feet; thence
southerly thirty-four feet four and a half inches; thence westerly
seventy feet to the place of beginning, being the same lot on which
the building known as the "El Dorado" now stands.

Also, the undivided one-fourth of that certain parcel of land commencing at a point distant eighty-one feet and a half south of the southwest corner of Washington street and Dunbar alley; running thence southerly along Dunbar alley fourteen feet; thence westerly twenty-three feet; thence northerly fourteen feet; and thence easterly twenty-three feet to the point of beginning, being the same lot on which the building known as the "Red Robin" now stands.

Also, the undivided one-half of that certain tract of land lying on the southeast corner of Sansome and Pacific streets, being known as the original beach and water lot, numbered forty (40) on the official map of San Francisco.

157 Also, the undivided one-half of those certain four fifty vara
lots in the block bounded by Mason, Powell, Lombard, and
Greenwich streets, numbered upon the official map four hundred and
ninety-three, four hundred and ninety-four, five hundred and fifteen,
and five hundred and sixteen.

Also, the undivided one-half of those certain lots situate on North Beach, and numbered upon said map fifteen hundred and twenty, and fifteen hundred and twenty-one.

Also, the undivided one-half of that certain lot situate on South Beach, and numbered upon said map one hundred and forty-five of the 100 vara lot survey.

All of the foregoing real estate is situate, lying and being in the city of San Francisco, California.

Also, that certain tract of land situate, lying and being in the county of Contra Costa, Cal., containing twenty-five hundred and fifty-two acres, more or less, known as the Alamo valley, and being part of the Amador ranch.

Also, an undivided interest in that tract of land containing
158 two leagues, more or less, and lying in the county of Sutter,
California, and known as the Vernon ranch.

Also, the undivided one-half of six town lots, in the town of Marysville, California, viz: No. 2, in block 14, range G; No. 6, in block 14, range G; No. 7, in block 14, range G; No. 4, in block 10, range H; No. 2, in block 12, range I; and No. 3, in block 12, range L.

Together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues, and profits thereof.

Personal Property.

Promissory notes.	J. Lewis Thompson ..	Dated 2nd Oct., 1852	$150	
“ “	N. Gorham	“ 18th Nov'r, 1852	150	
“ “	Gray & Starr.........	“ 1st July, 1853	500	
“ “	“ “ “	“ 19th Feb'y 1852	3,086	89
“ “	Wm. H. Gray.......	“ 23rd March 1853	2,600	
“ “	H. M. Lewis........	“ 22nd Nov'r 1853	500	
“ “	P. B. Schaeffer......	“ 6th March 1850	424	
“ “	F. N. Longacre......	“ 16th Jan'y 1850	100	
“ “	Edward Love.........	“ 21st “ 1850	400	
“ “	James L. Freaner....	“ 18th “ 1850	600	
“ “	Jas. Hyslap	“ 11th Oct., 1850	800	
“ “	Richard Larrimore ...	“ 16th “ 1850	400	
“ “	“ “......	“ “ “ 1850	400	

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Promissory note.	A. J. McDuffie......	Dated 15th Feb'y, 1850	100	
“ “	James Everhard....	“ 9th Sept., 1852	500	
“ “	S. M. Inney.........	“ 6th July, 1851	35	
“ “	W. A. Browne.......	“ 21st April, 1850	100	
“ “	E. M. Jarvis........	“ 15th Jan'y, 1850	100	
“ “	John F. Simmons....	“ 17th Dec'r, 1849	500	
“ “	Robert Haley.......			
“ “	John Hanley.......			
“ “	E. R. Clay..........	“ 9th Oct'r, 1849	332	
“ “	W. F. Savazey......	“ 4th Jan'y, 1850	400	
“ “	Thos. W. Harper	“ 1st Dec'r, 1849	283	50
“ “	A. Browne..........	“ 14th Feb., 1850	200	
“ “	E. M. Jarvis........	“ 25th Oct'r, 1849	400	
“ “	B. Schlessinger......	“ 25th No'vr, 1849	110	
“ “	H. M. Lewis	“ 22nd Nov'r, 1853	500	

Judgments.

Judgment of F. C. Gray and G. C. McMickle *vs.* John B. Steinberger, dated the 8th day of June, 1850, for fourteen thousand five hundred and forty-three and forty-four hundredths dollars, with interest at 12½ per cent. per month until paid, $14,543 40.

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Claims.

Claim F. C. Gray *vs.* the government of the United States in the hands of ——— Coustin, resident in the city of Washington. Claim of Volney Ostrandey, assigned to Gray and Chambers, also in the hands of said Coustin.

Also the undivided one-third of the half of the claim of Salvador Vallejo *vs.* the government of the United States, contracted by and under the authority of Col. John C. Frémont, during his command in California. Amount of the whole claim is $53,100, (fifty-three thousand and one hundred dollars.)

Also three-tenths of the following claims of the same character as the claim of Salvador Vallejo.

$\frac{4}{5}$ claim,	Salvador Vallejo	$53,100	
Claim,	Ignacio Pacheco	5,540	
"	Marcus Varca	4,967	
"	Francisco Castro	3,045	
"	Vicente Martinez	5,050	
"	J. José Vallejo	2,825	
"	J. Francisco Arce	5,000	
"	Bruno Benial	10,750	
"	Francisco Branch	1,250	
"	José Bereyeza	5,595	
"	Victor Cartes	12,912	50
Claim,	Benito Diaz	1,505	
"	Pedro Basquez.	3,375	
"	Gabriel de la Torre.	2,575	
"	Francisco Pico	2,950	
"	Vicente Esperanza	2,285	
"	Raphael Gonzales	26,000	
"	Francisco Morayo	3,320	
"	Bernardine Garcia	1,375	
"	José Castro	20,000	
"	Alexander Mesa	4,220	
161 "	Mariano Miranda.	4,450	
Claim,	Maria Josepha Sanchez	9,030	
"	Juan B. Alvarado	11,605	
"	Joaquin Castro	8,516	
"	Juan B. Burnell	5,750	
Claim of	P. Gomez	11,321	25
"	Santiago Duckworth	3,950	
"	Pancho Garcia.	1,535	
"	Mariano Sobranos	19,930	50
Also the whole of the claim of	Juan P. Olivera for	11,565	

Also, suit of F. A. Gray *vs.* the estate of Samuel Anderson, dec'd, in the State of Illinois, in which ——— Peck of Chicago is attorney for said Gray, dec'd. Also, the undivided one-half interest in the following building materials, and merchandize, to wit:

214 Johnston's patent rolling iron shutters.
100 casks nails.
400 squares tin.
A lot of hardware.
A lot of lumber.
A lot of laths, and
A lot of paints and oils.

Also, judgment of Daniel D. Wilson, *et al.*, *vs.* Thomas Sherry, dated 23rd day of July, 1852, for four thousand eight hundred and thirty-three dollars $\frac{99}{100}$ with costs.

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F.

Statement showing the amounts received by Franklin C. Gray, Cornelius J. Eaton, and Wm. H. Gray, from the partnership of Gray & Eaton, and appropriated to their individual use.

Am't rec'd by F. C. Gray, per statements A and B			$183,648 86
Off amounts disbursed by F. C. Gray, per partnership ac., per Exhibit C			123,044 87
Retained by F. C. Gray for his own use		$60,603 99	
Rec'd his share of bills receivable, considered as money, described in statement "D," and in't on same to 15th July, 1853, which were due concern of Gray & Eaton by Gray & Starr; ⅔ due by F. C. Gray		3,440 84	
		64,044 83	
Rec'd by C. J. Eaton		7,513 35	
" " W. H. Gray, his portion due on bills receivable as above; ⅓ of Gray & Starr's notes per Exh. D	$1,720 41		
Also his own note, which is described in Exhibit "D"	2,901 60		
		4,622 01	
			$76,180 19

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Account 2.

Statement of sums of money received from various sources by Franklin C. Gray, and properly chargeable to him, prior to the first of January, 1851, *in which Wm. H. Gray had an interest of one-third.*

1850.		
November 29.	To cash rec'd from El Dorado	$1,175
" 30.	" cash " " " "	6,354
December 31.	" cash " " " "	4,123
	" cash " per rent of lot NE. cor. Pacific and Dupont st's, E. L. Morgan, tenant, 1st January to 1st August, 1850, at $300 per month	2,100
	To cash rec'd for rent of same for five months, from 1st of August, 1850, to 1st January, 1851, at $150 per month	750
	To cash rec'd of Chas. Minturn, tenant, for rent of lot on Battery, near Broadway, 13 mo., to Dec. 20, 1850, at $150 per month	1,950
	To cash rec'd of R. Larrimore, tenant, for part of 50-vara lot, No. 66, for 5 mos., from 1st Aug., 1850, to 1st Jan'y, 1851, at $150 per mo	750
	" cash rec'd of Dr. O'Brien for rent of part of same	750

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	To cash rec'd of Seth Heard for interest in lot and house cor. Broadway and Battery streets	3,000
		20,952

Outstanding liabilities of Gray & Starr.

To E. W. Leonard, note of Gray & Starr to F. C. Gray, dated June 24, 1853, at 30 days' in't 4 per cent. per month	$2,000	
To E. Wadham, note of Gray & Starr, of May 15, 1853, at 3 per cent. per month	1,800	
To John Requar, note 15 May, '53, 3 per cent.	2,120	
To C. M. Chadwick, open ac	111 75	
" G. A. Grant, open ac.	503 55	
" J. H. Bosworth & Co., open ac	934 97	
" Books & Co., open ac	88 00	
		$7,558 27

Profit and loss.

Dr. per books of Gray & Starr	$23,973 41

Assets of the concern of Gray & Starr.

F. C. Gray, available	$356 81
Wm. H. Gray	1,471 24
C. J. Eaton said to be paid	35 21
Lewis Teal & Co. "	38 20

165 *Debt due Gray, Bro. & Co.*

Wm. H. Gray, ac. on their books	$1,861 70

Statement of sums of money received and disbursed by the administrators of Franklin C. Gray, from 16*th August*, 1853, *to Dec'r* 19*th*, 1855.

Amount rec'd by C. J. Eaton and William H. Gray, special administrators of Franklin C. Gray, including the sum of \$6, 670$^{\underline{50}}$, three-fourths of the cash in hand at the death of Franklin C. Gray, the remaining one-fourth being retained by C. J. Eaton		$19, 896 79
Amount received by C. J. Eaton and Joseph C. Palmer, administrators		24, 013 86
Am't rec'd by J. C. Palmer, administrator		7, 219 66
Whole amount received		$51, 130 31
Amounts paid out by C. J. Eaton and Wm. H.... Gray, special administrators for joint ac	$11, 191 84	
For ac. of es't of F. C. Gray	6, 952 63	
		$18, 144 47
Amounts disbursed by Eaton & Palmer, administrators for joint ac	$13, 303 37	
For es't of F. C. Gray	7, 034 03	
For ac. of Mrs. Gray	4, 300	
		$24, 637 40
166 Carried forward		$42, 781 87

Amount brought forward		$42, 781 87
Amounts disbursed by Palmer, administrator for joint ac	$4, 826 32	
For William H. Gray	100	
For ac. of Mrs. Gray	2, 000	
For es't of F. C. Gray	389 50	
For C. J. Eaton	252 29	7, 568 21
Total amount disbursed		$50, 350 08

Summary.

Total amount received	$51, 130 31
" " disbursed	50, 350 08
Balance due by adm'r	$780 23
Balance due by adm'r as above	$780 23
Off this sums commissioners 4 per ct. on $7, 219 66	288 79
Balance due by adm'r	491 44

☞ The whole amount disbursed will then be $50, 638\frac{87}{100}$.

167 *Statement showing amount of moneys received by Wm. H. Gray of Franklin C. Gray and his admr's.*

This sum, being $\frac{2}{3}$rd of amount charged to Wm. H. Gray on books of F. C. Gray, Bro. & Co., $\frac{2}{3}$ of $1,861 70	$1, 241 13
This sum, being $\frac{2}{3}$ of $1,471 24 charged to Wm. H. Gray on books of Gray & Starr	980 83
This sum, being $\frac{1}{3}$d amount of stock in firm of Gray & Parr furnished W. H. Gray by F. C. Gray $\frac{1}{3}$ of $10,000	3, 333 33
" sum being amount received on notes of Gray & Starr to F. C. Gray, and note of Wm. H. Gray to F. C. Gray; bills receivable due and outstanding at the death of F. C. Gray, said notes estimated as money as per Exhibit "D."	4, 622 01
" sum paid in by Palmer, adm'or, on the 24th Nov'r, 1855	100
	$10, 277 30

168 *Statement of moneys due W. H. Gray by the estate of F. C. Gray, dec'd.*

This sum, $\frac{1}{3}$ of $\frac{3}{4}$ of $85,074$\frac{19}{100}$ profits of the business of Gray & Eaton from 1st Jan'y, 1851, to 16th Aug., 1853, pr. Exh. "D."	21, 268 55
Sums of money received by F. C. Gray from profits of the El Dorado, and for rents prior to 1st Jan'y, 1851, one-third $29,952, per Exh. 1	6, 984
Sum, $\frac{2}{3}$ of $3,346, amount paid by W. H. Gray to G. B. Post & Co., and balance due them from Gray & Starr. (See voucher No. 1.)	2, 230 67
Sum, $\frac{1}{3}$ of $356,81, amount of F. C. Gray's ac. overdrawn on books of Gray & Starr	118 94
Sum, $\frac{1}{3}$ of the amount received by the adm'rs for rents, &c., since	

the 16th August, 1853, Wm. H. Gray here receives $\frac{1}{3}$ instead of $\frac{1}{3}$ of $\frac{3}{4}$ of the am't, C. J. Eaton having rec'd his one-fourth of all the money collected since the death of F. C. Gray, which $\frac{1}{4}$ is not included in the sum here divided, $\frac{1}{3}$ of \$14,646$\frac{84}{100}$ . . . 4, 882 28

35, 484 44

Summary.

Am't due Wm. H. Gray by estate of F. C. Gray, dec'd........	35, 484 44
Off am't rec'd by him....................................	10, 277 30
Balance due Wm. H. Gray........................	25,207 14

169 *Statement of sums of money paid out by the administrators of F. C. Gray, deceased, for account of said Gray's est. since the* 16*th of August,* 1853.

1853.				
August	16.	Cash paid court fees, legal services, vouchers filed, &c., in the probate court.........................	\$352 63	
September	3d.	Paid draft of F. C. Gray, New York, 26th April, 1853, due this day....	3, 330	
October	12th.	Draft of same due this day........	3, 270	
				\$6, 952 63

☞ This sum of \$6, 952 63, disbursed as above by C. J. Eaton and Wm. H. Gray, special adm'rs, as per their account hereto annexed, marked X.

The following sums were disbursed by J. C. Palmer and C. J. Eaton, adm'rs, as per their account, marked Z, herewith filed.

1854.			
June	1.	Paid appraisers by order..........	150
May	6.	Paid C. J. Eaton and Wm. H. Gray, special adm'rs by order of probate court......	2, 500
January	23.	Expenses in probate court..........	244 90
July	10.	Paid claim of John McDougall by order.........................	1, 000
170			
November	11.	Paid claim of John Manford by order.	850
July	21.	Paid Mrs. Matilda C. Gray...	2, 000
1855.			
February	5.	" " same................	2, 000
"	16th.	Sundry expenses................	18 13
1854.			
July	14.	Paid Foote & Leigh in case McDougal	250
October	11.	" Williams in suit Wm. H. Gray.	250
1855.			
February	5.	Paid Williams suit Wm. H. Gray...	500

1854.				
Nov'r	16.	Paid Foote....................	250	
1855.				
Feb'y	27.	" administrators' commission....	1,021	
"	24.	" Robert Rose for legal services to Mrs. Gray in New York........	300	$11,334 03
		The following sums were disbursed by J. C. Palmer, adm'r, for his ac. marked Z, herewith filed		
1855.				
April	6.	Paid costs in probate court to date (5)	92	
1853.				
Sept.	27.	" for advertising appointment of adm'rs......................	10	
Nov.	10.	Paid James E. Wainwright........	29 50	
May	31.	" same......................	1	
"	20.	" Mrs. Matilda C. Gray, (13)....	2,000	
July		" costs dist. court Eaton and Palmer, (14)....................	250	
Nov'r	23d.	Paid Henry S. Foote for legal services (15)........................	250	
				2,389 50
				$20,676 16
		Off this sum allowed Palmer's commissions....		288 79
				$20,964 59

171 *Statement of sums of money paid out by the adm'rs of F. C. Gray, for joint on partnership account of said Franklin C. Gray and Wm. H. Gray, for acc't of Wm. H. Gray and C. J. Eaton, and showing balance in hands of Palmer, adm'r.*

1853.				
September	1st.	Paid $\frac{3}{4}$ of notes due to G. W. Dennis, and int. at 2 per ct. per month....	$2,374	
October	25.	Paid $\frac{3}{4}$ of note to John Cowell......	750	
"	31.	" $\frac{3}{4}$ of note to John W. Righter, and interest..................	1,604 25	
Sept'r	9.	Paid $\frac{3}{4}$ of note to Seth Pearson.....	461 25	
"	30.	" $\frac{3}{4}$ of note to Jas. Gallagher, and int........................	1,968 75	
December	10.	Paid $\frac{3}{4}$ of note and int. to L. Pearson	461 25	
1854.				
January	23.	Paid $\frac{3}{4}$ balance due for freight and storage of building materials from Aug't 16 to date..............	1,137 19	
"	"	Paid $\frac{3}{4}$ of costs and repairs buildings and paving streets to date......	113 19	
"	"	Paid $\frac{3}{4}$ taxes for 1853 and 1854....	2,271 99	
				11,191 84
		This sum of $11,191 84 was disbursed by Wm. H. Gray and C. J.		

Eaton, special adm'rs, as per their account herewith filed, marked X.

172 The following sums were disbursed by Joseph C. Palmer and C. J. Eaton, adm'rs, as per their acc't herewith filed, marked Y.

1854.	Amount brought forward		$11,191 84
June 1.	P'd $\frac{3}{4}$ planking Pacific, Dupont and Vallejo streets	$1,595 54	
May 6.	" $\frac{3}{4}$ balance due on property purchased of L. Pearson	7,533 75	
January 23.	" $\frac{3}{4}$ repairs on buildings to first March, 1855	1,201 76	
	" $\frac{3}{8}$ freight and storage on m't'ze	408 94	
1855. February 16.	" $\frac{3}{4}$ State's interest in water lots	523 71	
1854. Nov'r 18.	" $\frac{3}{16}$ cost of El Dorado sidewalk	421 88	
December 16.	" $\frac{3}{4}$ State and county taxes	1,015 26	
February 1.	" $\frac{3}{4}$ legal services to O. P. Tyler	121 87	
March 8.	" $\frac{3}{4}$ legal services Parsons, Cook & Co.	234 00	
" 28.	" $\frac{3}{4}$ same	77 81	
June 13.	" $\frac{3}{4}$ legal services to Haight & Gary.	150 00	
July 5.	" $\frac{3}{8}$ " " Foote & Leigh.	18 75	
			$13,303 37

The following sums were paid out by J. C. Palmer, adm'r, as per his acc't herewith filed, marked L.

March 16.	Cash paid $\frac{3}{4}$ health inspector's bill, (2)	5 63	
" 19. 173	" " J. W. Leonard on his claim against estate, being note of Gray & Starr for $2,000, (3)	1,280 00	
" 22.	Cash paid $\frac{3}{8}$ bill storage on sash windows, (4)	27 84	
April 6.	Paid cash costs in probate court to date, (5); $\frac{3}{16}$ of paving Kearney st. in front of El Dorado, (6)	156 50	
	Amount forward	$1,469 97	$24,495 21
1855.	Am'ts brought forward	$1,469 97	$24,495 21
April 14.	Cash paid $\frac{3}{4}$th of sidewalk repairs to Jenkins, (7)	8 25	
14.	Cash paid $\frac{3}{4}$ taxes on lots in Marysville, (8)	11 25	
May 10.	" " $\frac{3}{4}$ city taxes, (9)	878 37	
October 3.	" " for copy decision in supreme court in Sherry, *et al.*, *vs.* Gray	5 00	
August.	Cash paid $\frac{3}{4}$ bill of R. D. Jenkins, repairs of the Florence House, (10)	141 32	
	Cash paid advertising appointment of adm'rs, James E. Wainwright		
1855. May 15.	Cash paid $\frac{3}{4}$ bill J. B. Crockett, legal services in Gray *vs.* Sherry	615 00	

May 31.	Cash paid notorial fees............		
June 15.	" " $\frac{3}{4}$ of Dan. Wright planking on Missouri street, (11)..........	300 00	
Nov'r 22.	Cash paid interest of Leonard claim..	640 00	
December 4.	" " State and county taxes....	757 16	4, 826 32
			$29, 321 53

	Money paid W. H. Gray by Palmer, adm'r, as per rec't, (12)..................................	100 00
174	Money paid for C. J. Eaton, being $\frac{1}{4}$ of State and county taxes..............................	252 39
	Balance in hands of J. C. Palmer, adm'r........	$491 44

ACCOUNT 3.

Statement of sums of money received by Mrs. Matilda C. Gray, as per account of administrator.

1854.	
July 21. Paid her by Palmer & Eaton, adm'rs........................	$2,000
1855.	
February 5. " " " " " "	2,000
" 24. Paid by same to Robert Rose for legal services rendered Mrs. Matilda C. Gray in New York..............................	300
June 20. Paid her draft by Palmer, adm'r..........................	2,000
	6,300

ACCOUNT 4 AND ACCOMPANYING PAPERS.

175 *Statement of the profits of the entire business carried on in the name of F. C. Gray, in which Wm. H. Gray and C. J. Eaton are interested, with the amount of the interest therein of J. C. Eaton, Wm. H. Gray, and of the estate of F. C. Gray, in which statement the parties interested are charged with the sums of money received by each of them, with a statement of sums of money received from the business of Gray, Bro. & Co. and Gray & Starr.*

Profits of partnership business carried on in the name of F. C. Gray, in which Wm. H. Gray had an interest of $\frac{1}{3}$d........	$20,952 00
Profits of business carried on in the name of F. C. Gray, in which C. J. Eaton has an interest of $\frac{1}{4}$..................................	85,074 19
Am't rec'd by F. C. Gray's admin'rs since his death, in which Wm. H. Gray had $\frac{1}{3}$ interest. This amount does not include a balance of $\$491\frac{44}{100}$ now in hands of Palmer, adm'r........	14,646 84
In this am't Eaton has an in't $\frac{1}{4}$ of $85,074\frac{19}{100}$...............	120,673 03
Amount rec'd from Gray & Starr's business................	6,663 77
" " " Gray, Bro. & Co's do....................	1,241 13
	128,577 93

Of this sum of $\$128,577\frac{93}{100}$, F. C. Gray is entitled to :

This sum $\frac{2}{3}$ of $20,968........................	$13,968
To $\frac{1}{3}$ of $\$85,074\frac{19}{100}$	42,537 09

To $\frac{2}{3}$ of $\$14{,}646\frac{84}{100}$	9,764 56	
To this sum from Gray & Starr	4,314 16	
" " " Gray, Bro. & Co	1,241 16	
	71,824 94	$71,824 94
C. J. Eaton's share $\frac{1}{4}$th of $\$85{,}074\frac{19}{100}$		21,268 55
		93,093 49
176 Wm. H. Gray's share is $\frac{1}{3}$ of $20,952	$6,984	
is $\frac{1}{4}$ of $\$85{,}074\frac{19}{100}$	21,268 55	
is $\frac{1}{3}$ of $\$14{,}646\frac{84}{100}$	4,882 28	
This sum from Gray & Starr's assets	2,349 61	
		35,484 44
		$128,577 93

F. C. Gray, rec'd in his lifetime	$20,952	
rec'd of $\$85{,}074\frac{19}{100}$ this sum	64,044 83	
rec'd by his adm'rs since his death	20,964 95	
rec'd from Gray & Starr's assets	2,349 61	
		$108,311 39
C J. Eaton has rec'd, pr. Exh. 6		9,989 24
W. H. Gray has rec'd, pr. Exh. 4		10,277 30
		128,577 93

Charge estate of F. C. Gray with this sum	$108,311 39	
Off this sum due estate of F. C. Gray	71,824 94	
		36,486 45
Balance due C. J. Eaton	$11,279 31	
" " Wm. H. Gray	25,207 14	
		$36,486 45

Mrs. Matilda C. Gray has rec'd since the death of F. C. Gray this sum, which is included in this sum of $\$108{,}311\frac{89}{100}$, which is charged to estate of F. C. Gray, as above	$6,300
Franklina C. Gray, the infant, rec'd nothing.	

177 The property on hand to be divided may be found on Exhibit F, supposed to be worth about $100,000. The two notes of H. M. Lewis of $500 each, mentioned in this statement, have been paid and should not be estimated as assets. See account of special adm'r. The building materials and merchandize have also been sold in part. See accounts of the special administrators, and Palmer and Eaton administrators.

Balance due by Palmer, adm'r		$491 44
$\frac{1}{3}$ of this due Wm. H. Gray	$163 81	
$\frac{2}{3}$ of same due est. of F. C. Gray	327 63	
		491 44

The first statement altered by including the balance of $491 44 in hands of Palmer, adm'r, would show the following results:

Whole amount received	$128, 577 93
Add balance in adm'rs hands	491 44
	$129, 069 37

Charge estate of F. C. Gray with this sum (made up of $108, 311 39 and $491 44.)		$108, 802 83	
Off share of est. of Gray	71, 824 94		
Add ⅔ of $491 44	327 63		
		72, 152 57	
		36, 650 26	
178 Balance due C. J. Eaton		$11, 279 31	
Bal. due Wm. H. Gray	25, 207 14		
Add ⅓ of $491 44	163 81		
		25, 370 95	
			$36, 650 26

Share of estate of F. C. Gray	$172, 152 57
" " C. J. Eaton	21, 268 55
" " Wm. H. Gray	35, 648 25
	$129, 069 37

A statement showing the whole balance distributed, and reducing the commissions to $587 71, shows same result as above, whole am't rec'd, exclusive of balance		$128, 481 66
Add balance in adm'rs hands		587 71
		$129, 069 37
Share of estate of F. C. Gray	$72, 152 57	
" " C. J. Eaton	21, 268 55	
" " Wm. H. Gray	35, 648 25	
	$129, 069 37	
Rec'd by Gray and his adm'rs since his death		$108, 802 83
" C. J. Eaton		9, 989 24
" Wm. H. Gray		10, 277 30
		$129, 069 37

Rec'd by est. of F. C. Gray, and by Gray himself during his lifetime, the sum of		$108, 802 83
Off share of estate		72, 152 57
Balance due Eaton	$11, 279 31	
" " Wm. H. Gray	25, 370 95	
	$36, 650 26	

179 *Estate of Franklin C. Gray, dec'd, to Cornelius J. Eaton, Dr.*

To this sum, being rent of Eaton's share of profits of business of Gray & Eaton, ¼ of $85,074\frac{19}{100}$, per Exhibit D		21,268 55
Cr.		
By cash rec'd by Eaton previous to the 16th August 1853, per Exh. D	$7,513 35	
“ “ rec'd ¼ of $8,894, am't of cash on hand on 16th August, 1853	2,223 50	
		9,736 85
Balance due C. J. Eaton		$11,531 70
Off this sum rec'd by Eaton on 4th of December, 1855		252 39
		$11,279 31

X.

Statement of receipts and disbursements in the matter of the estate of Franklin C. Gray, deceased, from the 16th August, 1853, to 23rd January, 1854, by C. J. Eaton and Wm. H. Gray, special administrators.

1853		*Special administrator, Dr.*		
August	19.	To cash rec'd from H. M. Lewis, being ¾ of his note for $500, and interest for 110 days, due the 8th inst.		$379 12
“	16th.	To ¾ of $8,894, bal. of ac. at the El Dorado		6,670 50
September	9.	“ ¾ of am't from Sam'l Marx on his note, due the 8th July		150

180

Sept.	26th.	To cash, ¾ J. R. Travers' note, 60 days from 16th July, int. at 3 per c't. per mo., note	$3,000	
		Int.	180¾	= 2,385
			3,180	
October	8.	“ “ ¾ bal. Marx's note		131 25
“	12.	“ “ ¾ am't rec'd of T. J. A. Chambers in settlement		1,852 67
Nov'r	17.	“ “ ¾ am't rec'd of C. H. West in settlement of all claims *vs.* him		375
Nov'r	21.	“ “ ¾ am't p'd by B. L. E. Bonneville		38 57
“	28.	“ “ ⅜ proceeds sale of a lot camphene and alcohol		251 60
Dec'r	21.	“ “ ⅜ “ “ “ “		14 77
“	22.	“ “ ¾ am't rec'd H. M. Lewis in part payment of a lot near Kearney st., part of No. 43.		225 00
Oct.	25.	“ “ ⅜ sale of lumber 15,276 feet to John Cowell		544 50
1854				
Jan'y	23.	“ “ ¾ of note H. M. Lewis of the 22nd Nov'r, 1853, and int. at 2 p'r c't.		390
“	23.	“ “ ¾ of all rents collected from the 16th August, '53, to this date		6,488 81
				$19,869 79

1853.		*Special Administrator, Cr.*			
August	16.	By cash paid court fees, "legal services," vouchers filed in the probate court..		352 63	
Sept.	1.	Bills payable, paid ¾ notes due to G. W. Dennis, int. at 2 p'r c't.—.........			
181		Note 25th April, for..........		2,000	
		" " May..........		1,000	
				Cr.	*Dr.*
		Interest 124 ¾ is..........	2,374		$19,896 79
Oct'r	25.	Borrowed money: by ¾ note to John Cowell, 11th July, for $1,000, without interest, in't..	750		
Oct'r	31.	By ¾, note to Jno. W. Righter, 16th Ap'l, 53 and in't 2 pr. ct. $2,000.........	1,604 25		
				4,728 25	
Sept'r	9.	By ¾ note to Luther Pearson due this day............	461 25		
"	30.	On payment property ¾ note to Jas. Gallagher, and int. for $2,500, int. at 10 pr. c., per annum for 6 mos..	1,968 75		
Dec'r	10.	" note to Luther Pearsons $615 ¾ is.............	361 25		
				2,891 22	
Sept'r	3.	" draft of F. C. Gray, New York, 26th April, 1853, due this day............	3,330		
Oct'r	12.	" do. do. N. Y., 9th June.	3,270		
				6,600	
1854.					
January	23.	" ¾ bal. due for freight and storage of building materials from August 16th, to date.........................		1,137 19	
"	"	" ¾ costs, repairs of buildings and paving streets to date................		163 16	
"	"	" ¾ taxes for '53 and '54............		2,271 99	$18,144 47
		Balance due by special adm'rs C. J. Eaton and W. H. Gray........................			$1,752 32

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Y.

Statement of receipts and disbursements in the matter of the estate of F. C. Gray, deceased, from 23rd January, 1854, *to* 1*st March,* 1855, *by Joseph C. Palmer and C. J. Eaton, administrators.*

1854		*Administrators, Dr.*	
January	23.	To cash rec'd from special adm'rs................	1,752 32
"	"	being ⅜ proceeds sale building materials by by T. J. A. Chambers................	1,410 88

February	15.	To cash $\frac{3}{4}$ am't collected in judgment, *vs.* James S. Graham, *et al*.	1,387 50
March	25.	“ “ $\frac{3}{4}$ of the am't collected in judg't *vs.* Jasper D. Carr	3,030
September	9.	“ “ $\frac{3}{4}$ bal. purchase money of lot sold to H. M. Lewis, near Kearney st., pt. 43	897
		$\frac{3}{4}$ rents from all sources during this period..	17,291 48
			$25,766 .18

1854.		*Cr.*	*Cr.*	
June	1.	By cash appraisers p'd by order	150	
		“ “ $\frac{3}{4}$ planking Pacific Dupont and Vallejo streets	1,595 54	
May	6.	“ “ paid C. J. Eaton and Wm. H. Gray, special adm'rs, by order probate court	2,500	
		“ “ real estate, $\frac{3}{4}$ balance due on property purchased of Luther Pearson	7,533 75	
Jan'y	23.	“ “ $\frac{3}{4}$ repairs on buildings to 1st March, 1855	1,201 76	
183		“ expenses in the probate court	244 90	
		“ merchandize p'd freight and storage $\frac{3}{8}$	408 94	
July	10.	“ claim of John McDougall, by order	1,000	
Nov'r	11.	“ “ John Manford, (compromised)	850	
				$25,766 18
		Amount carried over	$15,484 89	

				Cr.	*Dr.*
1854.		Amounts brought forward		$15,484 89	$25,766 18
July	21.	By cash, Matilda C. Gray..	$2,000		
1855.					
February	5.	“ “ do. do	2,000		
				4,000	
“	16.	“ “ $\frac{3}{4}$ State's interest in water lots		523 71	
1854.		sundry expenses		18 13	
Nov'r	18.	“ “ $\frac{3}{16}$ cost of El Dorado side walk		421 88	
Dec'r	16.	“ “ $\frac{3}{4}$ State and county taxes...		1,015 36	
Feb'y	1.	“ “ legal services, O. B. Tyler, $\frac{3}{4}$	121 87		
March	8.	“ “ Parsons, Cook & Olds $\frac{3}{4}$	234		
		do. do. do. $\frac{3}{4}$...	71 81		
“	28.	“ “ Haights & Gary, $\frac{3}{4}$	150		
July	5.	“ “ Foote & Leigh, $\frac{3}{8}$	18 75		
				602 43	
“	14.	“ “ do. do. case McDougall		250	
Oct'r	11.	“ Chas. H. S. Williams suit Wm. H. Gray $250			

1855.				
February 5.	By cash Chas. H. S. Williams, lent W. H. Gray....	500		
			750	
1854.				
Novemb'r 16.	" Henry S. Foote, do...........		256	
1855.				
February 27.	" Adm'rs annual ac. commissions		1,021	
" 24.	" Legal services, Robert Rose for services to Mrs. Gray in New York......................		300	
184				
				$24,637 40
	Balance due by adm'rs, Joseph C. Palmer and C. J. Eaton....................................			$1,128 78

Z.

Joseph C Palmer, adm'r in account with the estate of Franklin C. Gray, dec'd, Dr.

1855.		*Dr.*
March 1.	To cash, being balance on hand upon the —— of the account of Palmer & Eaton, adm'rs........	$1,128 78
Dec. 19.	To cash, being ¾ of the whole amount of rents collected from 1st March, 1855, to this date......	7,219 66
		$8,348 44

1855.				
March 16.	By cash p'd G. M. Garwood, health inspector, ¾ of his bill....		5 63	
19.	By cash, Wm. H. Gray p'd E. W. Leonard int. in his claim *vs.* estate, being note Gray & Starr for $2,000.......		1,280	
22.	⅜ bill storage on sash windows........		27 84	
April 6.	Costs in the hon. probate court to date..		92	
11.	3/16 " in paving Kearney st. in front of El Dorado		156 50	
14.	¾ repairs of side walk to R. D. Jenkins..		8 25	
"	¾ taxes on lots in Marysville..........		11 25	
May 10.	¾ city taxes, whole amount $1,643 66, ¾ of is....................	1,232 75		
	Paid in scrip at 71 cts.......	1,222 00		
	Paid in cash $10 75.........	$1,232 75		
	Cost of scrip and cash...............		878 37	
185				
Oct. 3.	Copy decisions sup. court, Sherry, *et al.*, *vs.* Gray.........................		5	
August "	¾ bill R. D. Jenkins, repairs "Florence House"		141 32	
	Amounts carried over........... ...		$2,606 16	$8,348 44

			Cr.	*Dr.*
		Amounts brought forward	$2,606 16	$8,348 44
1853.				
Sept'r	27.	By cash adv. appointment admr's	10	
Nov.	10.	" James E. Wainwright	29 50	
1855.				
May	15.	" ¾ bill J. E. Crockett, legal services in suit Gray *vs.* Sherry	615	
	31.	By cash notarial fees	4 50	
June	5.	" do. do.	1 00	
	15.	¾ Dan Wright bill planking on Mission street	300	
	20.	Draft Matilda C. Gray	2,000	
July.		Costs dist. court, Eaton *vs.* Palmer	2 50	
Nov.	23.	W. H. Gray, paid int. in Leonard claim.	640	
	23.	Henry S. Foote, legal services	250	
	24.	Wm. H. Gray, paid him	100	
Dec'r	4.	State and county taxes, "¼ of this to charge to Eaton"	1,009 55	$7,568 21
		Balance due by Joseph C. Palmer		780 23

JOSEPH C. PALMER.

(Copy.)

186 10. *Articles of agreement made the first day of November, A. D.* 1852, *between F. C. Gray, James Johnson, John B. Frisbie, and George W. Wright, of the city of San Francisco and State of California.*

The said parties mutually covenant and agree and with each other, as follows, to wit:

The said Frisbee agrees to devote his immediate and faithful attention to the collections and purchase (at such price as the parties may deem advisable) of claims against the government of the United States, contracted by or under the authority of Col'l John C. Frémont on account of the United States, during his command in California, and for that purpose to make such journeys to different parts of the State as may be deemed advisable, all which purchase shall be made on the account and for the benefit of the said parties, as hereinafter stated.

The said Gray and Johnston agree to advance to said Frisbie from time to time such sums of money as may be necessary for the defraying of his personal expenses in making said journeys, and collecting and purchasing said claims, and also to advance all such sums of money as may be required for the purchase of such claims.

187 And further, the said Gray and Johnston and Wright to use all their influence and exertions in procuring the allowance and payment of said claims at the city of Washington by the government of the United States,

It is further agreed that all the actual and direct costs and expences incurred in the collection and purchase of said claim, and in the prosecuting of the same at Washington, (including the said advances to be made to said Frisbie as aforesaid,) shall be first paid and reimbursed out of the profits arising from said operation or purchases, and after paying and reimbursing all such advances, costs, and expenses, the net profits of said operation or purchases shall be divided among the said parties in the following proportions, to wit: one fifth part of said net profits shall be paid to said Frisbie, one other fifth part thereof shall be paid to the said Wright, and the remaining three other fifth parts shall be divided equally between the said Gray and Johnston.

This agreement is to include the one half of the claim of Salvador Vallejo for the sum of $53,100 $\frac{00}{100}$, whereof Joseph C. Palmer and F. C. Gray are the present holders and assignees, that is to say, the net profits of one half of said claim are to be divided among the parties to this agreement in the foregoing proportions.

188 In witness whereof the said parties have hereunto set their hands and seals the day and year first above written, at San Francisco, California.

(Signed) F. C. GRAY. [SEAL.]
JAMES JOHNSON. [SEAL.]
JOHN B. FRISBIE. [SEAL.]
G. W. WRIGHT. [SEAL.]

In presence of CHAS. W. COOK.

(Copy.)

11. Articles of agreement made this first day of November, A. D. 1852, between F. C. Gray and James Johnson of the first part. and George W. Wright of the second part, all of the city of San Francisco and State of California, as follows, to wit: Whereas, on or about the first day of November, 1852, certain articles of agreement were mutually made and entered into by and between the said Gray, Johnson, Wright, and one John B. Frisbie, relative to the purchase of claims against the United States government for debts and liabilities contracted on behalf of said government by or under the authority of Col. John C. Frémont during his command in California, as will more fully appear by reference to said articles of agreement:

189 Now be it known that the said parties to this present agreement (which is hereby declared to be a modification of the said other articles of agreement so far only as respects the said parties to this present agreement) do hereby covenant and agree to, and with each other mutually, as follows, to wit: the said Gray and Johnston agree to make all the advances provided for by said other articles of agreement and also to advance the cost of the one half part (now held in the name of Joseph C. Palmer as assignee thereof) of the claim of Salvador Vallejo, mentioned in said other articles of agreement.

And the said Wright on his part binds himself and agrees to reimburse and pay to the said Gray and Johnston, within two years from

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this date, with interest at a reasonable rate, four equal fifteenth parts of all moneys and expenses advanced by them, pursuant to said other articles of agreement, and one equal third part of the costs advanced by them for the said half of the said claim of said Salvador Vallejo, held by Joseph C. Palmer as assignee as aforesaid; provided, however, that the said claim shall not sooner (to wit, on or before the expiration of said two years) be allowed and paid by the government of the United States; and in case of partial allowance and payment thereof by the said government, then the parties hereto shall account and settle with and pay to each other rateable 190 and equitably according to the principles hereinbefore and hereinafter stated.

And it is further agreed by the parties that the said Wright shall share in the profits of said business or operations as provided in said other articles of agreement except as to the said half of said claim of Salvador Vallejo, held by said Palmer as assignee as aforesaid; and as to the said half of said claim, the said Wright shall receive one equal third part of the nett profits ensuing therefrom.

In witness whereof the said parties have hereunto set their hands and affixed their seals the day and year first above written.

(Signed) F. C. GRAY. [SEAL.]
JAMES JOHNSON. [SEAL.]
G. W. WRIGHT. [SEAL.]

In presence of CHAS. W. COOK.

191 Testimony of Joseph C. Palmer, taken by examination on the 6th day of January, 1856. Being first sworn, states on oath:

There has been allowed on the Vallejo claim, at Washington, the sum of $11,700, which was paid to John Cock, jun'r, of New York city, by an arrangement between parties who claimed to have an interest in the fund; when I was in Washington, in the month of August last, I went as the administrator of F. C. Gray, and on my own account, to collect the money from the proper officer, one Mr. Whittlesey; he, Whittlesey, refused to issue the necessary warrants for the payment of the money without the consent of the various parties who claimed to have an interest in it. The parties claiming an interest were Robert M. McLane, one Mr. Harris, and Chubb Brothers. McLane's claim was under an employment made by some person having authority to prosecute this claim at Washington, to which employment was made before the purchase of this claim by myself, Gray and others; under which contract he claimed to be entitled to one-half the amount recorded. I finally settled with him at ten per c't.

Harris claimed under a like contract with F. C. Gray, by which he claimed twenty per cent. of the amount recovered. 192 By a written contract between Gray and Harris, the latter was to be allowed a reasonable compensation for his services in prosecuting this and other claims. Harris asserted that his compensation was increased to 20 per cent. by a subsequent verbal con-

tract with F. C. Gray. Brius, made a partner of Harris, stated that such was the understanding between Harris and F. C. Gray. to wit, that Harris was to receive 20 per cent. of the amount recovered for the prosecution of this and other claims at Washington. Harris refused to take less than fifteen per cent., which I declined paying. I offered ten per cent., which he refused to take. McLane and Harris had filed with Whittlesey caveats, forbidding the payment of this money to any one but themselves. All the claimants finally agreed that the money should be paid over to John Cook, jun'r, of New York, subject to an adjustment of their respective claims, and under this arrangement it was paid over to Mr. Cook. The claim of McLane was finally adjusted, as above mentioned, by a payment of 10 per cent., $\$1,170\frac{00}{100}$. The claim of Chubb Brothers by a payment of $250. I also paid Harris $250 on account of his claim. Thus the matter stands. The whole affair is now in the hands of Mr.
193 George W. Wright, who is authorized to adjust the controversy with Harris.

I have received nothing in the claim of Mariano Sobranos. John Cook, jr., is not a partner of the house of Palmer, Cook & Co., of this city, of which house I am a member, but the New York correspondent of the house of Palmer, Cook & Co. I believe that my account as sole administrator of F. C. Gray, furnished you to 19th December last, is correct.

(Signed) JOSEPH C. PALMER.

Testimony of Cornelius J. Eaton, before commissioner, upon examination on Tuesday, the 5th day of November, 1855, being first duly sworn:

Question 1. By Tevis and Page, of counsel for Wm. H. Gray. What property was owned by Franklin C. Gray and by yourself at the commencement of the partnership between you on the 1st day of January, 1851?

Answer. A lot on the northeast corner of Dupont and Pacific streets, 58 feet on Pacific and 137½ feet on Dupont. An undivided ¼ interest is 50 vara lot, No. 92, in the city of San Francisco. A lot on Pacific streets, between Kearney and Dupont streets, 26½
194 feet front by 13½ feet in depth, all in the said city. He had personal property or money, except what may appear on the books of the El Dorado on that day. F. C. Gray had purchased before that time one-fourth interest in the El Dorado property, on the southeast corner of Kearney and Washington streets, on which he (Gray) had paid $10,000; which sum of $10,000 had been raised by him by a mortgage of the above-mentioned lot on the corner of Dupont and Pacific streets. The above is a correct statement of the property *of the property* of Franklin C. Gray, according to the best of my belief, on the day above-mentioned. I owned at that time a lot on the east side of Powell street, between Washington and Jackson streets, 20 feet front by 60 feet in depth; also an undivided one-fourth interest in fifty vara lot No. 974, both in the city of San Francisco. I had also at that time a small sum of money, which

will appear on the books of the El Dorado as due to me. F. C. Gray owed me at that time $1,500, which went into partnership between us. I owned also an interest in the Mariposa Mining Company, which cost me about $1,500. The above is a correct statement of all the property and effects owned by Gray and Eaton at the 195 commencement of the partnership, so far as I recollect, subject to the following liabilities of F. C. Gray: (I myself owed nothing for which Gray was liable as partner; I owed $500 which I borrowed to defray my expenses in coming to California.) The debt of $10,000, above mentioned, to a Mr. Pettibones; a liability to S. P. Dewey and ——— Smith, of Sacramento, upon a lease of the Sutter House in that city. The amount of liability at that time was about $6,000. He owed at the same time about $15,000, being balance of the purchase money of the El Dorado property. There were other liabilities, which I cannot now remember. The schedule "B" (annexed to my complaint in Eaton *vs.* Palmer and others) contains all the property standing in the name of Franklin C. Gray, and owned by him and myself in partnership at the time of F. C. Gray's death.

(Endorsed :) Filed March, 1856.

HAYS, *Clerk.*
JOHN C. CORBETT, *D. C.*

196 [Memo. sale May 3rd, 1856.]

JAMES E. WAINWRIGHT. ALBERT G. RANDALL.

JAMES E. WAINWRIGHT, *Auctioneer.*

WAINWRIGHT, RANDALL & CO.,

REAL ESTATE AND STOCK AUCTIONEERS.

Office and sales room, No. 11 Merchant, north side, between Montgomery and Kearney streets.

Regular sale day.................................Saturday.

☞ We will give particular attention to making public sales of real estate, vessels, stocks, etc., for administrators, assignees, receivers, mortgagees, and others, according to law.

Terms of sale will always be announced by the auctioneer from the stand.

Acts of sale invariably at the purchaser's expense.

Purchasers are required to pay a deposit of ten per cent. at time of sale.

SATURDAY.

ON SATURDAY.................................May 3, 1856.

197 At 11 o'clock a. m.

AT SALES ROOM.............................100 Merchant street.

COMMISSIONER'S SALE OF A LARGE AMOUNT OF VALUABLE REAL ESTATE AND PERSONAL PROPERTY.

In accordance with the directions of a decree of the district court of the fourth judicial district of the State of California, entered in said court on the 27th day of October, 1855, and of a decretal order of the same court, made and entered on the 7th day of April, 1856, in the cases of William H. Gray *vs.* Joseph C. Palmer, administrator of Franklin C. Gray, deceased, and others, and Cornelius

J. Eaton *vs.* the said Palmer, administrator, and others, by which decree the undersigned was apppointed commissioner to execute the directions of the said decree, and by virtue of the authority vested in me by the above-mentioned decree and order, I shall proceed, as commissioner, on Saturday, the third day of May, 1856, at 11 o'clock a. m. on that day, at the sales room of Wain-
198 wright, Randall & Co, 100 Merchant street, in the city of San Francisco,
to sell at public auction, to the highest bidder, for cash, the following decribed real estate, personal property, rights, claims, credits, &c., &c., &c., to wit: House and lot on Ohio street, between Pacific street and Broadway.

[HOUSE.] Lot of land on the west side of Ohio street, 117½ feet south of Broadway; in size, 20 feet front and rear by 52 feet in depth, together with the two-story frame building situate thereon.—W. A. Riper, $600.

ALSO.—House and lot on Broadway, between Sansome and Montgomery streets.

[HOUSE.] Lot of land on the south side of Broadway, commencing at the north-west corner of 50 vara, lot number 197; thence running easterly 17 feet on Broadway by 57 feet 6 inches in depth, together with the frame building situate thereon.—Thos. S. Miller, $850.

ALSO.—Desirable corner lot on Pacific and Dupont streets.

Lot of land, situate on and forming the northeast corner of Pacific and Dupont streets, having a frontage of 58 feet on Pacific street and 60 feet on Dupont street.—Brignardello, do. Patrick Plover, No. 1, $4,525; No. 2, 2,900; No. 3, $2,575.

199 Also, lot adjoining on Dupont street. A lot of land, situate on the east side of Dupont street, 60 feet north of Pacific street; in size, 54 feet 6 inches front and rear, by 58 in depth.—Simon Perden, $5,050.

Also, lot on Pacific street, between Kearney and Dupont streets A lot of land, situated on the north side of Pacific street, 58 feet east of Dupont street; thence easterly, 25 feet 10 inches front, by 137 feet 6 inches in depth.—J. C. Palmer, $3,000.

Also, lot adjoining on the east, having a frontage of 26 feet on Pacific street, by 137 feet 6 inches in depth.—R. R. Quain, $3,300.

Also, house and lot on Pacific street, above Kearney street.

[HOUSE.] Lot of land situated on the north side of Pacific street, commencing at the southeast corner of fifty vara lot No. 48; thence running westerly 26 feet 6 inches by 137 feet 6 inches in depth, being the easterly portion of fifty-vara lot 48; together with the two frame buildings situate thereon.—J. C. Palmer, $5,500.

200 Also, house and lot on Dunbar alley, in the rear of the City Hall:

[HOUSE.] Lot of land on the east side of Dunbar alley, 53 feet 6 inches south of Washington street, being 28 feet front and rear, by 23 feet in depth; together with the frame building thereon.—J. C. Palmer, $1,150.

Also, fifty vara lot, corner Bay and Larkin streets:

Fifty vara lot number 49, in the western addition, situated on the northwest corner of Bay and Larkin streets.—Gwin Page, $25.

Also, water lot property: Original water lot No. 625, situated on the easterly side of Spear street, between Market and Mission streets, 45 feet 10 inches front and rear, by 137 feet six inches in depth.—J. C. Palmer, $13 00.

Also, original water lot No. 759, situated on the easterly side of Spear street, between Howard and Folsom streets, 45 feet 10 inches front and rear, 137 feet 6 inches in depth.—J. B. Crockett, $10 50.

201 Also, original water lot, No. 630, situated on the northerly side of Mission street, between Beale and Main streets, 45 feet 10 inches front and rear, by 137 feet 6 inches in depth.—W. A. Piper, 17 75.

Also, original water lot, No. 635, situated on the northerly side of Mission street, between Main and Spear streets, 45 feet 10 inches front and rear, by 137 feet 6 inches in depth.—W. C. Matthiesse, 11 50.

Also, original water lot, No. 641, situated on the northerly side of Mission street, between Spear and Stewart streets, 45 feet 10 inches front and rear, by 137 feet 6 inches in depth.—John Peel, 11 30.

Also, valuable property on the southeast corner of Stockton and Vallejo streets:

Lot of land situated on and forming the southeast corner of Stockton and Vallejo streets, having a frontage of 68 feet 9 inches on Stockton street and 137 feet 6 inches on Vallejo street, the same being the north half of 50
202 vara lot No. 92—C. J. Eaton, 10,000.

Also, an undivided interest in the "El Dorado property."

[HOUSE.] The undivided one-fourth part of that desirable, valuable property, situated on the southeast corner of Washington and Kearney streets, consisting of the lot of land fronting 34 feet 4½ inches on Kearney street, and 70 feet on Washington street, with the four-story brick building situate thereon, known as the "El Dorado."—C. J. Eaton, 7,500.

Also, valuable property situated on the southeast corner of Sansome and Pacific streets.

[HOUSE.] The undivided one-half part of lot of land, situated on and forming the southeast corner of Pacific and Sansome streets, fronting 45 feet 10 inches on Sansome street, and 137 feet 6 inches on Pacific street, the same being known as the original beach and water lot No. 40, together with the frame buildings thereon.—C. J. Eaton, 6,200.

Also, original fifty vara lots, Nos. 493 and 494, situated on Greenwich street, between Powell and Mason streets, and elegant family residence.—Gwyn Page, 1,750.

203 The undivided one-half part of fifty vara lots, numbered 493 and 494, situated on the north side of Greenwich street, between Powell
[HOUSE.] and Mason streets, being each 137 feet 6 inches square, together with the undivided one-half of the improvements situate thereon, the elegant family residence of T. J. A. Chambers, esq., being included.—T. J. A. Chambers, 1,850.

Also, original fifty vara lots, Nos. 515 and 516, situated on Lombard streets, adjoining the above on the north.

The undivided one-half part of fifty vara lots, numbered 515 and 516, situated on the south side of Lombard street, between Powell and Mason streets, each being 137½ feet square.—C. J. Eaton, 1,150.

Also, original one hundred vara lot, No. 145, situated on the northwest corner of First and Brannan streets:

The undivided one-half part of one hundred vara lot, numbered 145 of the hundred vara lot survey, situated on the northwest corner of First and Brannan streets, and having a frontage of 275 feet on each street.—J. C. Palmer, 1,700.

204 Also, an undivided interest in lot and brick building on Dunbar's alley, in the rear of and adjoining the City Hall.

[HOUSE.] The undivided one-fourth part of lot of land on the west side of Dunbar's alley, 81½ feet south of Washington street, 14 feet front and rear by 23 feet in depth, and the undivided one-fourth part of the brick building situate thereon.—C. J. Eaton, 900.

Also, an undivided interest in north beach property.—225.

The undivided one-half part of the two fifty vara lots, situated on the south side of Bay street, between Taylor and Jones streets, numbered 1520 and 1521, each being 137 feet 6 inches square.—J. C. Palmer, 325.

☞ All of the foregoing real estate situate, lying, and being in the city of San Francisco, California.

Also, farming land, in Contra Costa county, portion of the Amador rancho.

205 That certain tract of land situate in the county of Contra Costa, containing twenty-five hundred (2,500) acres, more or less, known as the Alamo valley, being a part of the Amador rancho.—C. J. Eaton, 1,000.

Also, land in Sutter county:

An undivided interest (being about two-thirds) in that tract of land containing two leagues, more or less, situate in the county of Sutter, California, and known as the Vernon rancho.—C. J. Eaton, 13,000.

Also, Marysville property:

The undivided one half part of six lots in the city of Marysville, viz:

Lot No. 2, in block 14, range G; lot No. 6, in block 14, range G; lot No. 7, in block 14, range G; lot No 4, in block 10, range H; lot No. 2, in block 12, range L; lot No. 3, in block 12, range L.—C. J. Eaton, 240.

Personal property, claims, etc.—Promissory notes.

J. Louis Thompson, dated October 2nd, 1852	$150 00
A. Gorham, dated November 28, 1852	150 00
F. G. Schaeffer, dated March 6, 1850	224 00
Edward Love, dated January 21, 1850	400 00
Jas. L. Freanor, dated January 18, 1850	600 00
Jas. Hyslop, dated October 11, 1850	800 00
206 Richard Larrimore, dated October 16, 1850	400 00
Richard Larrimore, dated October 16, 1850	400 00
A. J. McDuffie, dated February 15, 1850	100 00
Jas. Everhard, dated September 9, 1852	500 00
S. M. Juney, dated July 6, 1851	35 00
W. A. Browne, dated April 21, 1850	100 00
E. M. Jarvis, dated January 15, 1850	110 00
John F. Simmons Robert Huley Jno. Hanley dated December 17, 1849	5,000 00
E R. Clay, dated October 9, 1849	332 00
Wm. F. Swasey, dated January 4, 1850	400 00
Thos. M. Harper, dated December 1, 1849	283 50
A. Brown, dated February 14, 1850	200 00
E. M. Jarvis, dated October 25, 1849	400 00
B. Schlessinger, dated November 25, 1849	110 00

Judgments.

F. C. Gray & G. C. McMickle *vs.* John B. Steenberger, dated the 8th day of June, 1850, for fourteen thousand five hundred and forty-three dollars and forty-one cents, with interest at 12½ per cent. a month until paid.

Also, assignment of judgment of Daniel D. Wilson, *et al.*, *vs.* Thomas Sherry, dated 23d day of July, 1852, for four thousand eight hundred and thirty-three dollars and ninety-nine cents, with costs.

Sale of this property postponed at the written request of parties concerned.

207 Also, claims of F. C. Gray *vs.* the government of the United States, in the hands of ——— Caustin, resident in the city of Washington.

Also, claim of Volney Ostrinaer, assigned to Gray & Chambers, also in the hands of said Caustin.

Also, the undivided one-third of the half of the claim of Salvador Vallejo *vs.* the government of the United States, contracted by and under the authority of

Col. John C. Frémont during his command in California. The amount of the whole claim is $53, 100, fifty-three thousand one hundred dollars.

Also, three-tenths of the following claims of the same character as the claim of Salvador Vallejo :

Four-fifth claim Salvador Vallejo	$53, 100	00
Claim Ignacio Pacheco	5, 540	00
Claim Marcus Varca	4, 967	00
Claim Francisco Castro	3, 045	00
Claim Vincente Martinez	5, 050	00
Claim J. José Vallejo	2, 825	00
Claim J. Francisco Arce	5, 000	00
Claim Bruno Bernal	10, 750	00
Claim Francisco Branch	1, 250	00
Claim José Berreyesa	5, 595	00
Claim Victor Castro	12, 912	50
208 Claim Maria Josepha Sanchez	9, 030	00
Claim Juan B. Alvarado	11, 605	00
Claim Joaquin B. Castro	8, 516	00
Claim Juan B. Burnell	5, 750	00
Claim V. P. Gomez	11, 321	25
Claim Santiago Duckworth	3, 950	00
Claim J. Benito Diaz	1, 505	00
Claim Pedro Basquez	3, 375	00
Claim Gabriel De la Torre	2, 575	00
Claim Francisco Pico	2, 950	00
Claim Vicente Esperanza	2, 285	00
Claim Raphael Gonzalez	26, 000	00
Claim Francisco Morago	3, 320	00
Claim Bernardino Garcia	1, 575	00
Claim José Castro	20, 000	00
Claim Alexander Mesa	4, 220	00
Claim Mariando Mirando	4, 405	00
Claim Pancho Garcia	1, 525	00
Claim M—— Goberanes	19, 930	50
Also, the whole of the claim of Juan P. Olivera for	11, 565	00

Also, a lot of Johnston's patent rolling iron shutters.

209 A.

State of California,
County of San Francisco.

In the dist. court of the 4th jud'l dist.

Wm. H. Gray
vs.
F. C. Gray, adm'r, &c., and
C. J. Eaton
v.
same.

Mr. Jas. D. Thornton, com'r in the above cases, is hereby requested to withdraw the within described personal property, claims, &c., from the sale to be made this day, May 3d, 1856.

CROCKETT, PAGE & TEVIS,
Atty's for W. H. Gray.
GLASSELL & LEIGH,
Atty's for C. J. Eaton.
H. S. FOOTE,
For the administrator and other defendants.

210 William H. Gray
vs.
Joseph C. Palmer, adm'r of Franklin C. Gray, dec'd, and others.

In the district court of the fourth judicial district of the State of California.

To the honorable judge of the district court of the 4th judicial district of the State of California.

The undersigned has the honor to report that, in accordance with the directions of this honorable court, he proceeded to sell and did actually sell, on Saturday, 3d day of May, 1856, at the sales room of Wainwright, Randall & Co., No. 100 Merchant street, in the city of San Francisco, after duly advertising the same according to law, the real estate ordered to be sold by the decree pronounced on the 27th October, 1855, in the above-stated causes. The sale of the personal property, judgments, claims, &c., was deferred at the request of the parties concerned, made to the undersigned in writing, which said writing is herewith returned as a part of this report marked, "A." The preceding pages from 1 to 3, both inclusive, exhibit the result of the sale, amounting in the aggregate to sixty-nine thousand one hundred and seventy, ($69,170.) All of which is respectively submitted.

(Signed) JAMES D. THORNTON,
Cmomissioner.

San Francisco, 6, 1856.

Endorsed: Filed May 14, 1856.

211 I hereby certify the foregoing to be a true and correct copy of the original report of J. D. Thornton, the commissioner in the suits within named, now on file in my office, June 6th, 1857.

Attest: THOS. HAYES, *Clerk.*
[SEAL.] By R. K. WOODFALL, *D. Clerk.*

Decree amending interlocutory decree.

William H. Gray
vs.
Joseph C. Palmer, adm'r of F. C. Gray, dec'd, *et als.*, and
C. J. Eaton
vs.
Joseph C. Palmer, adm'r. of F. C. Gray, dec'd, *et al.*

On this day cause the several parties, Palmer and defendant, by their respective attorneys, and it appearing to the court that copies of the rule to show cause made on the 10th day of May, 1856, and of the affidavit on which said rule was founded, have been duly served on the respective attorneys of the several defendants, and on H. S. Foote, guardian *ad litem* for the infant defendant, and 212 the said defendants having shown no cause why the motion of said William H. Gray, to amend the interlocutory decree entered in the above causes on the 7th day of April, 1856, should not be granted, and the court being satisfied that said interlocutory decree, and that said error was the result of a mistake and inadvertence on the part of the att'y who drew up the same. It is ordered that the motion of the said William H. Gray to amend said interlocutory decree, so as to make the same conform to the original decree and to the commissioner's report filed herein, on the 25th day of March, 1856, be and the same is hereby granted.

And it is further ordered on motion of said William H. Gray, that the following amended interlocutory decree be entered *nunc pro tunc*, in lieu of the said decree which was entered on the 7th of April, 1856, to wit:

nunc pro tunc

William H. Gray
vs.
Joseph C. Palmer, adm'r of F. C. Gray, deceased, *et al.*
Cornelius J. Eaton
vs.
Joseph C. Palmer, adm'r of F. C. Gray, dec'd, *et al.*

213 James D. Thornton, the commissioner, appointed in the above-entitled causes to state the partnership accounts between the respective parties, having filed his report herein on the 25th day of March, 1856, it is hereby ordered that the said report be, and the same is hereby in all things approved and confirmed, and it is further ordered, that said commissioner do proceed to sell all the property, real and personal, of the said partnership, as directed in the former decree of the court, and to receive the proceeds of said sale, out of

[illegible]

which he shall pay the costs and expenses of this suit, and the remainder shall be paid and distributed to the several parties according to their respective rights and interests as ascertained and settled by the former decree of this court, and by the said commissioner's report, and in accordance and with said decree and report. But is ordered that before making said distribution and after collecting and receiving the proceeds of said sale, the commissioner report to this court his proceedings in the premises and the amount in his hands subject to such distribution, and the several interests of the respective parties therein upon the basis settled in his former report.

CHAS. M. CREANER.

Nunc Pro Tunc

214 Endorsed : Filed May 14, 1856. After Sale

Decree of distribution.

STATE OF CALIFORNIA,
County of San Francisco :

In the district court of the fourth judicial district.

WILLIAM H. GRAY
vs.
FRANKLIN C. GRAY'S administrator, &c., and—
C. C. EATON
vs.
FRANKLIN C. GRAY'S adminstrator, &c.

This day came the parties, by their attorney, and it is ordered and decreed that out of the interest of William H. Gray, Matilda Gray, and Franklin C. Gray, ascertained and reported by the commissioner, in the money's received and to be received from the proceeds of the sale of property in the above cases, the said commissioner, James D. Thornton, shall pay the following claims in the order mentioned, one-third of which is chargeable to William H. Gray, and the other two-thirds to Matilda Gray and Franklina C. Gray, to wit:

215 1st. Note of Gray & Starr to F. C. Gray, endorsed to E. W. Leonard, dated June 24th, 1853, for two thousand dollars, ($2,000,) with interest at four per cent. per month from November 19th, 1851, until paid.

2nd. Judgment in favor of John Regan, in favor of Gray & Starr, in the district court of the fourth judicial district, for two thousand four hundred and thirty-eight dollars, with interest from the 18th day of October, 1853, and costs one hundred and sixty-eight dollars and ninety-eight cents.

And it is further ordered, that out of the interest of William H. Gray, ascertained and reported as aforesaid in the moneys received and to be received from the proceeds of said sale, the said commissioner shall pay the following claims against said William H. Gray in the order mentioned, to wit :

1st. Note to George Hepham, dated December 8th, 1853, for six thousand dollars, with interest at five per cent. per month, the balance due this day thereon per agreement ten thousand five hundred and thirty-five dollars, secured by mortgage and said Gray's interest.

2nd. Notes to Crockett, Page & Tevis, including interest to date, secured by mortgage, eight thousand dollars.

216 3rd. Judgment in favor of G. B. Post & Co., rendered April 10th, 1856 for debt and costs, together three thousand and twenty dollars and seventy-five cents.

4th. Judgment in favor of ——— McCauley for two thousand dollars, with interest at six per cent. per month from January 17th, 1856, and costs.

A. C. MONSON, *Dist. Judge.*

We hereby consent to above decree, dated June 11, '56.

CROCKETT, PAGE & TEVIS,
Att'ys for W. H. Gray.
GLASSELL & LEIGH,
Att'ys for C. J. Eaton.
H. T. FOOTE,
Att'y for M. C. Gray and child, and administrator.

Endorsed : Filed June 13, 1856.

HAYES, *Clerk.*
CORBETT, *D. C.*

Estate of Franklin C. Gray, postponed from Saturday 13*th inst.*, *at sales room No.* 100 *Merchant street.*

217 Re-sale of real estate by order of James D. Thornton, commissioner, for account of purchasers at sale of May 3rd, 1856, who have failed to comply with the terms as prescribed at sale and set forth in the following notice.

Report of re-sale.

In accordance with the directions of a decree of the district court of the fourth judicial district of the State of California, entered in said court on the 27th day of October, 1855, and of a decretal order of the same court, made and entered on the 7th day of April, 1856, in the cases of William H. Gray *vs.* Joseph C. Palmer, administrator, etc., of Franklin C. Gray, deceased, and others, and Cornelius J. Eaton *vs.* the said Palmer, administrator, and others, by which decree the undersigned was appointed a commissioner to execute the directions of the said decree, and by virtue of the authority vested in me by the above mentioned decree and order, I shall proceed as commissioner on Saturday the third day of May, 1856, at 11 o'cl'k a. m. of that day, at the sales room of Wainwright, Randall & Co., No. 100 Merchant street, in the city of San Francisco, to sell at public auction to the highest bidder for cash, the following described real estate :

The commissioner is required to report the sales made under the
said decree with all convenient speed to the court for its
218 action, and when said sales have been confirmed by the court,
and the purchasers shall have complied with the terms of
sale, all legal and proper conveyances, bills of sale, and assignments will be executed and delivered to the purchasers, conveying to them all the right, title, and interest of the parties to the above actions.

JAMES D. THORNTON,
Commissioner.

SAN FRANCISCO, *April* 10, 1856.

Pursuant to the above notice all the real estate therein referred to was sold at public auction on the day specified, which sales were subsequently confirmed by the decree of said court, and the purchasers of the property hereinafter described having failed to settle for the same, it will be resold to the highest bidder for cash.

House and lot on Ohio street, between Pacific and Broadway.

Lot of land on the west side of Ohio street, 127½ feet south of Broadway, in size 20 feet front and rear by 50 feet in depth, together with the two story frame building situate thereon.—(350, J. P. Overton.)

Also, house and lot on Broadway between Sansom and Montgomery streets.

Lot of land on the south side of Broadway, commencing on
219 the northwest corner of 50-vara lot No. 197, thence running
easterly 17 feet on Broadway, by 57 feet 6 inches in depth, together with the frame building situate thereon.—(725, Richard Cross.)

Also, lot on Pacific street between Kearney and Dupont streets.

Lot of land situated on the north side of Pacific street, 58 feet east of Dupont street, thence easterly 25 feet 10 inches by 137 feet 6 inches in depth.—(2,100, J. P. Overton.)

Also, house and lot on Pacific street above Kearney street.

Lot of land situate on the north side of Pacific street, commencing on the southeast corner of fifty-vara lot No. 48, thence running westerly 26 feet 6 inches by 137 feet 6 inches in depth, being the easterly portion of fifty-vara lot No. 48, together with the two story frame building situate thereon.—(2,250, J. P. Overton.)

Also, house and lot on Dunbar alley in the rear of city hall.

Lot of land on the east side of Dunbar alley 53 feet 6 inches south of Washington street, being 28 feet front and rear by 23 feet in depth, together with the frame building situate thereon.—(800, J. P. Overton.)

220 Also, water lot property.

Original water lot No. 625, situated on the easterly side of Spear street between Market and Mission streets, 45 feet 10 inches front and rear by 127 feet six inches in depth.—(900, W. T. Coleman.)

Also, original water lot No. 641, situated on the northerly side of Mission street between Spear Steuart streets, 45 feet 10 inches front and rear by 137 feet 6 inches in depth.—(955, W. T. Coleman.)

Also, original one hundred-vara lot No. 145, situated on the northwest corner of First and Brannan streets.

The undivided one-half part of one hundred-vara lot No. 145, of the hundred-vara lot survey, situated on the northwest corner of First and Brannan streets, and having a frontage of 275 feet on each street.

Also, an undivided interest in north beach property. The undivided one-half part of the two fifty-vara lots situated on the south side of Bay street between Taylor and Jones streets, mentioned 1,520 and 1,521, each being 137 feet 6 inches square.

221 All of the foregoing real estate is situated lying and being in the city and county of San Francisco, State of California. Ten per cent. of the purchase money will be required to be paid at the time of sale, the balance on the morning of sale.

Immediately after the sale of the foregoing desirable corner lot of a residence or retail business—lot of land situate on the southeast corner of Minna and Fifth streets, has a frontage of 35 feet on Minna street, and 74 feet on fifth street. Title, perfect. Terms, cash.

Also, 9 lots of land adjoining on Minna street, each 24 feet 8 inches front and rear, by 80 feet in depth, as per plan of sub-division of 100-vara lot, No. 134, on exhibition at salesroom.

Also, leasehold property on Dunbar alley, opposite the City Hall, together with stock and fixtures of a saloon.

One-story frame building situated on the east side of Dunbar's alley, opposite the City Hall, now used and occupied as a bar-room, "the Ivy Green," together with the unexpired term of lease of the lot on which it stands, in size 28 feet front and rear by 23
222 feet in depth, but moderate, and the entire stock, fixtures, furniture, &c., contained in said house. Possession given immediately. Terms, cash. For further particulars apply on the premises, or to the auctioneers.

To the honorable the judge of the district court of the fourth judicial district of the State of California:

The undersigned, commissioner of the court, has the honor to report that the purchasers of the various parcels of property mentioned on the foregoing page having failed to comply with the terms of sale made on the 3rd day of May last, the undersigned, in accordance with the directions of this court, did proceed to sell, after advertising the same, for account of said purchasers, the said property, on Saturday, the 21st of June, 1856, at which sale the persons whose names are placed opposite to the different parcels of property became the purchasers thereof for the amounts preferred to their respective names, all of which is respectfully submitted.

JAMES D. THORNTON,
Commissioner.

Endorsed: Filed July 21, 1856.

HAYS, *Clerk.*

In the 4th district court.

223 WILLIAM H. GRAY, plaintiff,
vs.
CORNELIUS J. EATON and JOSEPH C. PALMER, administrators of the estate of Franklin C. Gray, deceased; the said CORNELIUS J. EATON in his own right, MATILDA C. GRAY and FRANKLIN C. GRAY, defendants.

And

In the 4th district court.

CORNELIUS J. EATON, plaintiff,
vs.
JOSEPH C. PALMER, administrator of the estate of Franklin C. Gray, deceased, MATILDA C. GRAY, FRANKLINE C. GRAY, and WILLIAM H. GRAY, defendants.

Commissioner's report.

To the honorable John S. Hager, judge of the 4th judicial district of the State of California:

The undersigned, appointed by this hon. court commissioner in the above causes, has the honor to report that he has, in accordance with the directions of this court, sold a large amount of real property and some personal property, from which he *he* has received the sum of $65,860 02 as appears from an Exhibit marked 1, hereto appended as a part of this report, and that he has disbursed of this
sum the amount of $63,809 99, leaving cash on hand $2,050 03/100,
224 subject to the order of this honorable court.

Exhibit No. 2, hereto annexed and asked to be taken as a part of this report, shows the items and amount of disbursements, the expenses of executing this commission, including court costs amount, as will be seen by reference to Exhibit 3, annexed to report, and asked to be considered a part of it to $3,909 01. Exhibit 4 shows a distribution of the whole amount received, somewhat modified by a few inconsiderable items paid after this exhibit was made up, which will be noticed in a subsequent part of this report. Exhibit 5 shows a general distribution among the parties in interest, and the amounts due by C. J. Eaton, and estate of F. C. Gray and to William H. Gray, showing the amount due by Eaton to be $293 34/100, and by the es't of Franklin C. Gray $3,535 67½, the amount due Wm H. Gray is $5,588 64¼.

The amount cash on hand is $2,050 03 which $293¾ (amount due by Eaton) makes up $2,052 96¾, which being paid to Wm. H. Gray leaves $3,535 67¼ still due him, being same as amount due by estate of F. C. Gray, then paying over $2 50 retained by commissioner for costs of estate of F. C. Gray, per Exhibit 3, to Wm. H. Gray it leaves balance due William H. Gray, by the estate $3,533 17¼. The items
above alluded to as modifying Exhibit 4, are $13 paid for labor,
225 and $166 for costs taxed to Eaton, and $2 50 retained for costs
of estate of F. C. Gray.

At the sale of the 3rd May last, C. J. Eaton purchased certain ranch property, and six lots in the city of Marysville, for $2,400, and at the sale of 25th September last, he also purchased certain claims, judgments, &c., for the price of $4,000—this property, the claims, judgments, &c., I was informed at the times of the respective sales by the attorneys of all the parties in interest, were purchased for the common benefit of all concerned, it was obvious that the interest thus brought for the common benefit would otherwise have been sold at a ruinous sacrifice, and it was so brought that this result might be prevented.

The undersigned, in compliance with the wishes of the attorneys of the parties in interest, has executed a deed for the same to said Eaton as purchaser.

The vouchers for the payments made by your commissioner accompany this report. All of which is respectfully submitted.

JAMES D. THORNTON,
Commissioner.

226 No. 1.

Amount received by James D. Thornton, commissioner.

Received of	C. J. Eaton	$25,750	
"	W. A. Reper	1,175	
"	T. J. A. Chambers	1,150	
"	N. C. Mathewson	1,000	
"	W. R. & Co., 150, Mc. dep	150	
"	Brighardelli & Roncaute	6,725	
"	W. R. & Co., 700	700	
"	Patrick Plover	2,325	
"	W. R. & Co., 250	250	
"	R. Lattimore	3,100	
"	W. R. & Co., 200	200	
"	S. Reardon	4,550	
"	W. R. & Co., 500	500	
"	J. C. Palmer	2,250	
"	J. P. Overton	2,000	
"	Richard Cross	645	
"	W. R. & Co., 100, as dep	100	
"	W. R. & Co. 80, c's dep	80	
"	W. T. Coleman	1,669	50
"	W. R. & Co., 185 50 c. dep	185	50
"	T. J. A. Chambers	1,800	50
"	J. C. Plamer	663	
"	W. R. & Co., coll'd by them of Dehon	9	40
"	same, rec'd by them of Taylor & Co	90	37
"	same, do. do. do. do. King & Co	3	75
"	W. R. & Co., deposit of Peel, forfeited	113	
"	J. P. Overton, am't of his purchase	3,400	
"	Crockett, Page & Tevis	4,675	
		$65,860	02

227

No. 2.

Amount of money disbursed by commissioner.

Paid expenses of sales as per statement	3, 807 51
Paid to Geo. T Upham and int't for ac. of Wm. H. Gray, as per order of 4th dist. court of 13th June, 1856	10, 535
“ judgment of John Reyna *vs.* Gray & Starr, as per same order, $\frac{1}{3}$ of which chargeable to W. H. Gray, and $\frac{2}{3}$ to est. of F. C. Gray	4, 937 69
“ note of Gray & Starr, endorsed by F. C. Gray and E. W. Leonard, dated June 24, 1853, per same order, $\frac{1}{3}$ chargeable to W. H. Gray, and $\frac{2}{3}$ to est. of F. C. Gray	2, 539 00
“ judgm't G. B. Post & Co. *vs.* W. H. Gray, per same order of 4th dist. court	3, 071 04
“ Crockett, Page & Tevis, for ac. of W. H. Gray for same order	5, 000 00
“ judgm't in favor of McCauley *vs.* W. H. Gray, per same order, for ac. of W. H. Gray	2, 588 25
Paid Wm. H. Gray per receipt	3, 400 00
“ C. H. Eaton for receipt	24, 750 00
“ cash per receipt for labor	13 00
“ costs taxed to Eaton	166 00
Retained for costs of F. C. Gray	2 50
	$63, 809 99

228

No. 3.

Expenses of sale showing items.

Paid commissioner's fee, per stipulation	$2, 000 00
“ for acknowledging deed of fund commissioners to F. C. Gray and others	2 50
“ Wm. Hooper consideration in above deed	1 00
“ costs of court	37 00
“ same to Grant for taking depositions	60 00
“ for labor	70 00
“ for advertising in S. F. Herald	308 00
“ “ same in Marysville Herald	100 00
“ “ same in Oakland Leader	40 00
“ Wainwright, Randall & Co., for bill of posters, &c	75 00
“ same for plans and elevations	150 00
“ same, expenses of sale of 21st June, advertising and catalogues	118 00
“ said commission on sales of 3rd May and 21st June	500 00
“ same and catalogues of last sale	80 60
“ same for labor and porterage	10 00
“ same commission on last sale	51 41
“ court costs taxed to W. H. Gray	204 00
“ for labor	13 00
“ costs taxed to Eaton for receipt	166 00
Retained for costs of estate of F. C. Gray	2 50
	$3,989 01

229 No. 4.

Statement showing distribution of the entire sum realized from sales.

To C. J. Eaton, am't his purchases, viz:			
Lot, cor. Stockton and Vallejo streets..		$10, 000	
¼ of El Dorado property		7, 500	
Lot, SE. cor. Sansome and Pacific sts..		6, 200	
Lot, (50) vara, 516, on Sansome st...		1, 150	
Lot and building on Dunbar alley, ¼..		900	
		25, 750	
Less the sum paid by Eaton		1, 000	
Amount payment to Eaton			24, 750
To W. H. Gray note to Upham		$10, 535	
judgm't C. B. Post & Co..		3, 071 04	
claim of Crockett, P. & T.		8, 000	
McCauley's judgm't		2, 588 25	
Overton's purchases for 1 jud., 21 June		3, 400	
⅓ of Leonard's note	846 33		
⅔ Regna's judgm't	1, 045 89		
		2, 492 23	
			30, 086 52
To estate of F. C. Gray, per order of 14th June, '56.			
⅔ of note to E. W. Leonard		$1, 692 66	
and ⅔ of Regna's judgment		3, 291 89⅓	
			4, 984 46
Expenses per statement			3, 807 51
Cash on hand			2, 231 53
			$65, 860 02

230 *Recapitulation.*

Payment to Eaton	24, 750
" W. H. Gray	30, 086 52
" Est. of F. C. Gray, dec'd	4, 984 46
" Expenses	2, 231 53
Cash on hand	3, 807 51
Entire amount of sales	65, 860 02

No. 5.

Statement showing a general distribution and amount due C. J. Eaton and Wm. H. Gray, and amount due by estate of Franklin C. Gray.

Whole amount received by commissioner	$65, 860 02
Less expenses of commission, per statement..	3, 807 51
	62, 052 51

Of which ¼ is C. J. Eaton's share		15, 513 12¾	
" ¼ is W. H. Gray's share		15, 513 12¾	
" ½ is share of est. of F. C. Gray		31, 026 25½	
		62, 052 51	
This sum is to be distributed as follows:			
Due C. J. Eaton, per report of April, '56		11, 279 31	
Off his stipulation		2, 000	
		$9, 279 31	
Due C. J. Eaton, as above, ¼th		15, 513 12¾	
			24, 792 43¾
Due W. H. Gray, per report of April, 1856		$25, 207 41	
Off as per stipulation		5, 000	
		20, 207 41	
231 Due W. H. Gray, as above, ¼th		15, 513	
			$35, 720 53¾
Estate of F. C. Gray's share		31, 026 25½	
Off due C. J. Eaton, pr. report of April, 1856, as above	$9, 279 31		
Off due W. H. Gray, for same	20, 207 41		
		29, 486 72	1, 539 53½
			62, 052 51

Due C. J. Eaton, per statement		$24, 792 43¼
Paid him		24, 750
Due Eaton		$42 43¾
Due W. H. Gray, per statement	35, 720 53¼	
Paid him	30, 086 52	
		$5, 634 01¾
Paid est. of F. C. Gray, per statement	4, 984 46	
Off due est	1, 539 53½	
		$3, 444 92½

The amount of cash on hand is $2,231 53, of which $42 43¾ should be paid Eaton, leaving balance of cash, $2,189 09¼, to go to Wm. H. Gray, then the balance coming to him is $3,444 92½, due by the est. of Franklin C. Gray, dec'd. Thus—

Cash on hand after paying Eaton is	$2, 189 09¼
Balance due by est. of F. C. Gray	3, 444 92½
	$5, 634 01¾

Since making the above distribution I have paid out items for
labor $\$13\frac{00}{100}$, for Eaton's costs $\$166\frac{00}{100}$, and retained estate of
F. C. Gray's costs $\$2\frac{50}{100}$, amounting to $\$181\frac{50}{100}$ which
232 will reduce the sum to be distributed by the latter amount.
The effect of this will be to diminish the amount finally due
Eaton by \$45 37½, and bring him in debt \$2 93¾. It will have the
same effect on the amount finally due Wm. H. Gray, reducing it to
\$5,588 61¼, and will increase the amount due by the estate of F. C.
Gray $\$90\frac{75}{100}$ making it 3,535 67½. The amount of cash on hand is
$\$2,050\frac{03}{100}$, which with $2\frac{93}{100}$, (am't due by Eaton,) makes up \$2,072 96¾,
which being paid to W. H. Gray leaves \$3,535 67¼ still due him,
being same as amount due by estate of T. C. Gray, then paying
\$2 50, retained for the estate as above, to Wm. H. Gray, it silences
the balance due Wm. H. Gray by the estate, \$3,533 17¼.

Endorsed : Filed Nov. 21, 1856.

J. A. BRADY, *Dep. Cl'k.*

233 *Decree of Confirmation.*

In the district court of the fourth judicial district.

WILLIAM H. GRAY
vs.
JOSEPH C. PALMER, adm'r of F. C. Gray,
deceased, *et al.*

C. J. EATON
vs.
JOSEPH C. PALMER, adm'r of F. C. Gray,
deceased, *et als.*

On the 21st day of Nov'r, 1856, came James D. Thornton, the
commissioner heretofore appointed by the court to audit and adjust
the accounts of the several parties to the suit, and for other purposes,
as appears by the former decree of this court, and filed his final
report, which is in all things approved and confirmed; and it appearing from said report that there remains due and owing to the plaintiff, William H. Gray, from the estate of F. C. Gray, dec'd, the sum
of five thousand five hundred and eighty-eight $\frac{64}{100}$ dollars, after deducting all payments heretofore made, and that there remains in the
hands of said commissioner the sum of two thousand and fifty-two
$\frac{96}{100}$ dollars, balance of proceeds of sales made by said commissioner,
under the prior orders and decrees of this court.
234 It is thereupon adjudged, ordered and decreed, that the
said commissioner pay to the said William H. Gray the sum
last aforesaid, and take his receipt therefor as a credit *pro tanto* upon
the said balance of five thousand five hundred and eighty-eight $\frac{64}{100}$
dollars due from said estate to said William H. Gray as aforesaid,
after deducting which credit there will remain due and owing from
said estate to the said William H. Gray the sum of three thousand
five hundred and thirty-three $\frac{17}{100}$ dollars.

And the court doth further adjudge, order and decree, that the said estate and the defendant, Joseph C. Palmer, as the administrator of the estate of said estate, out of any assets of said estate in his hands to be administered, or which shall hereafter come into his hands as such administrator, do pay to the said William H. Gray the sum last aforesaid, with interest thereon from the date of this decree at the rate of ten per cent. per annum until paid.

JNO. S. HAGER, *Dist. Judge.*

Endorsed: Filed Nov'r 24th, 1856.

HAYES, *Clerk.*
BRADY, *D. C.*

235 *Remittitur.*

In the supreme court of the State of California.—April term, A. D. 1858.

William H. Gray
vs.
C. J. Palmer, *et als.*, and
J. C. Palmer, *et als.*,
advs.
C. J. Eaton.

On appeal from the district court of the 4th judicial district in and for the county of San Francisco.

And now at this day this cause being called and having been heretofore argued and submitted and taken under advisement by the court, and all and singular the law and the premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Burnett J. Terry, C. J., concurring to the effect that the decree of the court below in the case of Eaton *vs.* Palmer *et al.*, so far as it effects the rights of the infant Franklina C. Gray, should be reversed, and that the decree in the case of Gray *vs.* Eaton, *et als.*, should be reversed as to both the appellants, and the cause remanded for further proceedings.

Wherefore it is now considered, ordered, adjudged and decreed by
the court here that the decree of the district court of the
236 fourth judicial district in and for the county of San Francisco,
in the case of Eaton *vs.* Palmer, *et als.*, so far as it effects the rights of the infant Franklina C. Gray, be and the same is hereby reversed with costs; and that the decree in the case of Gray *vs.* Eaton, *et al.*, be and the same is hereby reversed as to both the appellants and the cause remanded for further proceedings.

I, Chas. S. Fairfax, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the thirteenth day of April, A. D. 1858, and now remaining of record in my office.

Witness my hand and the seal of the court affixed at this office this second day of June, A. D. 1858.

CHAS. J. FAIRFAX, *Clerk.*
By DAV. T. BAGLEY, *D. Clerk.*

Endorsed : Filed June 5, 1858.

W. DUER, *Clerk*.
p. J. B. McMINN, *D. C.*

237 Supreme court of the State of California.—April term, A. D. 1858.

William H. Gray
vs.
Matilda C. Gray, and others; and
Cornelius J. Eaton
vs.
Joseph C. Palmer, and others.

Decision.

William M. Gray
vs.
Matilda C. Gray, and others ; and
Cornelius J. Eaton
vs.
Joseph C. Palmer, and others.

In July, 1853, Franklin C. Gray died in the State of New York, leaving there a widow, Matilda C. Gray, and an infant daughter, Franklina C. Gray, and property held in his name, in this State, appraised at $237,000. In January, 1854, administration was granted to Joseph C. Palmer and Cornelius J. Eaton. In February, 1854, William H. Gray, a brother of deceased, filed a bill against Palmer and Eaton, and Matilda C. Gray and Franklina C. Gray, alleging a partnership between him and the deceased in his lifetime.
238 In January, 1855, a trial was had on special issues before a jury, a verdict was given for the plaintiff, and motion made for a new trial, which was denied by the court. In April, 1855, Eaton commenced a similar suit. In October, 1855, these suits were consolidated by consent of parties, and on the 27th October, 1855, a decree was entered by consent. In November, 1856, another decree was rendered ; and in September, 1857, Matilda C. Gray retained another attorney, who was appointed guardian *ad litem* for the infant, and mother and child take this appeal.

The learned counsel for the appellants has made several points, some of which apply to both causes, and others only to one.

But before we proceed to examine the points made by the appellants, we must first dispose of the motion made by the plaintiffs to dismiss the appeal upon the ground that it was not taken within the time limited by the statute. The fate of the motion depends upon the question whether a decree rendered 27th October, 1855, was interlocutory or final. If final, the appeal was too late ; if interlocutory, the appeal was in time.

The decree adjudges that a partnership existed between Eaton and

the deceased, and a different partnership between William H. Gray
and the deceased ; each partnership embracing all business and
239 all property, real and personal, of the parties, and decides that
the partnership of William H. Gray was subject to that of
Eaton ; the decree settled the proportionate interest of each partner, and directed an account of the partnership transactions to be taken by a commissioner appointed for that purpose. It was also ordered that when the commissioner shall have made his report, and the same shall have been passed upon by the court, the commissioner should proceed to sell all the real and personal property of the partnership, allowing all the parties to become purchasers, if they chose.

In the case of Ray *vs.* Lowe, 3 Cranch, 178, it was held that a decree for a sale of mortgaged premises upon a bill to foreclose was a final decree. The same doctrine is held in the case of Whiting et al. *vs.* The Bank U. S., 13 Peters, 6. So in the case of Travis *vs.* Waters, 12 John., 500, it was held that a decree on a bill for specific performance on the coming in of the master's report, as to the granting of land to be conveyed, and the payments made, directing the balance due to be paid, and the conveyance to be executed, was a final decree. So in the case of Field *vs.* Ros's Mon., 138, it was decided that a decree ascertaining the amount of complainant's demand directing a sale and ordering the payment of costs was final ;
240 the court said that the sale "was only a ministerial act to
effectuate what was decreed."

But it will readily be seen that these cases do not come up to the circumstances of this case. In the cases mentioned above the sum due to the party was specifically ascertained, and certain specific property directed to be sold. The acts necessary to carry the decree into full effect were clearly ascertained and specifically stated. In the present case the fact of partnership and the original proposition of each partner in the partnership were settled, but the partnership accounts had to be taken, and the question whether any of the real estate should be sold, and what portion remained open ; the decree had not ascertained any specific sum as due to any or more of the partners. It was evidently not a final decree, but merely interlocutory. The decree was necessary before any accounts could be taken, and the present relative rights of the parties determined ; the decree did not settle their present condition, but only the original terms of the partnership. It might turn out, upon the accounts being taken, that Eaton and William H. Gray had received their full share. Conceding that the decree was correct as to the original terms of the
partnership, in such case no appeal would be necessary.—(1,
241 J. J. Marshall, 498 ; 4 Sum., 495 ; 6 How. U. S., 209 ; 8
Wend., 219 ; 1 Ral. *v.* R., 20 ; 2 Com., 57 ; 10 Whea., 502.)

Coming, then, to the points made by the appellants, the first objection urged by them is, that the plaintiffs were holders of claims against the estate of Franklin C. Gray, deceased, and could sustain no suit in the district court unless they had averred and proved that they were presented to the administrator for approval or rejection. This was not done, and it is insisted that the district court had no jurisdiction; this objection is fatal, if it be true that the plaintiffs were holders of claims against the estate.

The word claim is certainly a very broad term when used in certain connections and in reference to certain matters. Lord Coke truly says that "the word demand is the largest word known to the law, save only, claim; and a release of all demands, discharges all rights of action." Chief Justice Nelson says, "The word claim is of much broader import thăn the word debt, and embracing rights of action belonging to the debtor beyond those which may appropriately be called debts."—(2 Hill R., 223.)

But however broad may be general meaning of this term, we must look to the statute to ascertain the sense in which it is there used.

242 The "statute to regulate the rudements of the estates of deceased persons," required the executor or administrator to give "notice to creditors of the deceased, requiring all persons having claims against the deceased to exhibit them," (sec. 128;) "that every claim presented to the administrator shall be supported by the affidavit of the claimant that the amount is justly due, that no payments have been made thereon, and that there are no offsets," &c., (section 131;) that "every claim," when allowed, "shall be filed in the probate court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration," (section 123;) that when "when any claim shall be presented to the administrator or probate judge, and he shall be willing to allow the same in part, he shall state in his endorsement the amount he is willing to allow if the creditor refuse to accept the amount," &c., (section 139;) so if the executor or administrator is himself a creditor, his claim shall be authenticated, (section 149;) he is required to return a statement of all claims against the estate which have been presented to him, and "in such statement he shall designate the name of the creditors, the nature of each claim, when it became due or will become due, and whether it was allowed by him," (section 147.)

243 In other sections of the act the word claim is used in the same manner, (sections 150, 220, 222, 228 to 249.)

It would seem to be clear, from different sections of the act taken and considered together, as well as from the nature and reason of the case, that the words claimant and claim are used as synonimous with creditor and legal demand for money to be paid out of the estate.

But it was not the scope and purpose of these suits to make claims against the estate to be paid of it in due course of administration. Conceeding the allegations of the claimants to be true, the surviving parties were entitled to the possession and management of the partnership effects, and the only interest that the heirs could have in the partnership assets was the nett interest of their ancestor, after the partnership debts were all paid. It was necessary to file the bills and make the administrator, the widow, and infant, parties, for the reason that the real estate stood upon the record in the name of the deceased. In the theory of our system the estate of the ancestor, personal and real, rests in the heir, subject to the possession and lien of the administrator for the payment of debts and expenses of

administration. As the real estate was held in the sole name of the deceased, and the administrator had possession of the personal
244 property, the whole belonged prima facia to the estate. To
rebut this prima facia evidence, ownership and right of possession, and legally vest the property in the partnership, it was necessary to bring these suits. The primary object was to obtain control of the partnership property, and sale of so much of it as would be required to pay the partnership debts, and for a partition of the remainder of the real estate, if any. These complex objects could only be accomplished in the district court; the probate court had no judicial means to do this.

The second objection by the appellant is, that the court had no jurisdiction of the person of Franklin C. Gray, in the case of Gray *vs.* Eaton and others; the affidavit of publication was made by "L. Humphreys, clerk in the office of the Placer Times and Transcript," when the statute requires the affidavit to be made by the principal clerk. But this objection is not well taken, as it is clear from the affidavit that there was but one clerk in the office. When there is but one clerk his affidavit must be sufficient, and it is unnecessary for him to improperly describe himself as principal clerk.

In the case of Eaton *vs.* Palmer and others, the affidavit of
245 Eaton states, that Mrs. Gray and child were residents of the
State of New York, but does not state in what portion of the State they resided, nor that the affiant was not informed of or did not know the fact. In the amended complaint of Wm. H. Gray, in the case of Gray *vs.* Eaton and others, the fact is stated that Mrs. Gray and child resided in Brooklyn, in the State of New York. The plaintiff Eaton, then, had notice of the place of residence of the two defendants, and should have so stated in his affidavit. The result of his failure to state this fact was, that the court did not direct a copy of the complaint and summons to be deposited in the post office. This defect was not cured by the appearance of the mother in her own behalf. The twenty-ninth section of the practice act requires the service of the summons, when the suit is against a minor under the age of fourteen, to be made by delivering a certified copy of the summons and complaint to the infant personally, and also to his father, mother, or guardian. When the infant is over the age of fourteen, the service is only to be made upon him as he may chose his own guardian, as the statute requires personal service of summons upon the infant, although under the age of fourteen. It is clear that a copy should have been put into the post office, directed to the infant, in the same manner as if over the age of
246 fourteen. The court had no right to appoint a guardian ad
litem until the infant was properly brought into court.

We are compelled to give the twenty-ninth section of the code this construction. Although there may seem to be no good reason for requiring personal service upon a minor under the age of fourteen, the language of the second subdivision is too clear to admit of any doubts, and it is not our right to make, but only to construe, the statute.—(Led. on Constitution, 293, 395, 306, 309, 311, 379.) In the

New York code, the service was only required to be made upon the guardian when the minor was under the age of fourteen.—(Section 113, first Rep. of Com., p. 134.) In the act of April 22nd, 1850, (Statutes of 1850, p. 430,) the same provision as that contained in the 29th section of our code is found, with a slight difference in the grammatical structure of the sentence. So in the practice act of
1850, personal service was required upon a person of unsound
247 mind, as also upon his guardian, while in our present code
the personal service upon the lunatic is dispensed with. These facts show that the provision requiring personal service upon the minor under the age of fourteen, and also upon his guardian, is not the result of a misprint or clerical mistake, but the deliberate will of the legislature. As such it is our duty to carry it out.

The third objection made by the appellants is, that the complaints do not allege the existence of such a partnership as to entitle the plaintiffs to file a bill as partners, and it is questioned whether there can exist such a relation as a universal partnership.

The question in this case regards the rights of the partners as between themselves. A partnership between the partners themselves may be defined to be a contract of two or more persons to unite their property, labor, and skill, or some of them, in the prosecution of some joint and lawful business, and to share the profits in certain proportions.

In most partnership agreements there is a stipulation to share the profits and bear the losses in certain proportions, but if parties are so disposed, they are competent to agree that all the parties shall participate in the profits, while a portion shall bear all the losses of
the original capital. If, for example, A, B, and C should agree
248 that A and B should put in the sum $10,000 each, and C the
sum of $20,000, and that all partners should give their personal attention to the partnership business, share the profits in equal proportions, but in case of any loss of any portion of the original capital that loss should alone fall on A and B, there would seem to be no doubt of this being a partnership.

There can be no doubt at this day that a partnership may exist in the purchase and sale of lands.—(Story on Partnership, sec. 83; Collyer, sec. 51, note.) But such partnership can only exist where the contract is reduced to writing.—(Story, sec. 83.) And it is not necessary that the partners should be jointly concerned in the original purchase, where the interests of the parties are afterwards mingled. But the partners must by the contract be jointly concerned in the future sale.—(3 Kent, 25, 26.)

In reference to this subject Mr. Justice Story remarks: "Nor is there in reality, as between the parties themselves, any difference whether the partnership property held for the purposes of trade or business, consists of personal or moveable property or real or immoveable property, or of both, as far as their ultimate rights and interests are concerned."

This language is very clear and distinct. As between the
249 parties, the partnership property may consist of either real

or personal estate, or both, and in each case their ultimate rights are the same, and it does not matter in whose name the real estate may be held; he is only a trustee of the partnership, and the real estate, for the purpose of disposal and distribution, is to be treated as personal estate. An exception may be stated, as when there are no partnership debts to pay, in which case the real estate should be partitioned if practicable.—(Section 92, 93.) And this being the true character of partnership real estate, the surviving partner has an equitable lien upon it for his indemnity against the debts of the firm, and for the balance that may be due to him from the firm.—(Col. on Part., section 135 and note.) For the same reason the widow and heirs have only an interest in the net partnership property, after all the partnership debts are discharged.

But it is insisted that there cannot be a dormant partnership in the purchase and sale of real estate. This objection would not seem to be well taken. As between the partners themselves there can be no difference whether the business is commercial or dealing in real estate; as between the partners and third persons, the law in re-
250 gard to dormant partners will not apply, (Petts *vs.* Waugh, 4 Mass. Rep., 424; 3 Kent, 31, note A;) and we can see no reason why parties should not be competent to form a universal partnership. There is nothing impracticable in it, or against morality or public policy. Of course such an universal partnership would not be held to exist unless the intention was clearly expressed.

It is also insisted by the learned counsel for the appellants, under his third point, that though it be conceded that Gray has stated a case of partnership in his complaint, Eaton has not. The instrument claimed by Eaton to constitute articles of copartnership is set out in his complaint, and must constitute his sole evidence of the relation between him and the deceased.—(Lee *vs.* Evans, October term, 1857.)

This effect of this objection depends upon the true construction of the instrument. The instrument is an unusual form for partnership articles, and is only executed by the deceased. It purports in the first part of it to sell to Eaton one-fourth of all the real and personal property then owned by the deceased, or that might be owned by him within the next two years, or within the time the connection should continue, should it continue beyond the time specified.
251 It was evidently an executory and not an executed contract. Eaton, on his part, was bound to remain with the defendant for two years. At the expiration of which period a division of all property, real and personal, was to be made, unless the parties should wish to continue longer. Among other conditions to be performed were these:

2nd. That Eaton should unite all the funds he may hereafter become possessed of in the joint fund, for the purpose of accumulation.

"3d. The outstanding debts shall be paid out of the joint fund held against the party of the first part." Taking the different portions of the agreement together, and we must conclude that the relation created by it was a partnership. 1. The contract was executory; 2, Gray put in all his property; 3, Eaton was to put all his future property into the joint fund, and also his time ; 4, these were to be all in the concern, "for the purpose of accumulation;" 5, the debts were to be paid out of the "joint fund;" 6, a division of all the property was to be made, the one-fourth to Eaton and the other three-fourths to the deceased; 7, the property to be divided consisted of that put in, with its accumulations.

The fourth objection urged by the appellants is, that the decree was against the evidence. This objection only applies to the
252 case of Gray *vs.* Eaton and others.

It is alleged by William H. Gray that written partnership articles were executed by the deceased and himself, but that the same was destroyed by the fire in June, 1851, in the city of San Francisco. It is certain from the proof that the two brothers were in partnership in a mercantile house in San Francisco, but the fact renders it now probable that the partnership was confined to that house, and the recollection of the witnesses has relation to that concern, and not to the alleged universal partnership. There is only one witness to prove the contents of the partnership articles, and his recollection does not seem to have been very distinct. The evidence to establish such a partnership, after the death of one of the partners, should be clear and full, and not subject to doubt; the circumstances all taken together leave the greatest room for doubt.

We have examined the testimony carefully, and we cannot resist the impression that the evidence did not warrant the decree. It would be a greater labor than we can perform, consistently with the other business of the court, to review the evidence in full in this opinion.

The other points made by the appellants are not important.
253 Our conclusion is that the decree in the case of Eaton *vs.* Palmer and others, so far as it affects the rights of the infant, Franklina C. Gray, should be reversed, and the decree in the case of Gray *vs.* Eaton and others should be reversed as to both the appellants, and cause remanded for further proceedings.

BURNETT, J.

I concur. TERRY, C. J.

I, Charles S. Fairfax, clerk of the supreme court, do hereby certify that the foregoing printed lines contain a true copy of the original opinion delivered on the above-entitled cause on the 13th day of April, A. D. 1858, and now on file in my office.

Witness my hand and the seal of the court this 2nd day of June, A. D. 1858.

CHARLES S. FAIRFAX, *Clerk*,
By DAV. F. BAGLEY, *D. Clerk*.

Endorsed : Filed June 5, 1858.

WM. DUER, *Clerk*,
p. J. B. McMINN, *D. C.*

254 *Decree of dismissal.*

District court of the fourth judicial district, city and county of San Francisco.

CORNELIUS J. EATON, plaintiff,
ag'st
JOSEPH C. PALMER, administrator of the estate of Franklin C. Gray, MATILDA C. GRAY and FRANKLINA C. GRAY, defendants;
and
WILLIAM H. GRAY, plaintiff,
ag'st
JOSEPH C. PALMER and CORNELIUS J. EATON, administrators of the estate of Franklin C. Gray, deceased, MATILDA C. GRAY and FRANKLINA C. GRAY.

Those consolidated actions being regularly and duly called on the callender, in their order, for trial at the April term, A. D. 1861, of this court, and said Cornelius J. Eaton being duly called in open court, and failing to appear, and no one appearing on his behalf, and the defendants appearing by their attorneys, Hall McAllister and W. W. Crane, jr., and asking of the dismissal of the action of said Cornelius J. Eaton *vs.* Palmer and others above named, because of the premises, now, on application of said attorneys, it is hereby adjudged 256 and decreed, by reason of the premises, that the action and complaint of Cornelius J. Eaton *vs.* Joseph C. Palmer and others herein, defendants, be, and the same is hereby, dismissed, with costs in favor of the defendants, and the judgment be entered accordingly. April 1, A. D. 1861.

JNO. S. HAGER, *Judge.*

Endorsed : Filed April 1, 1861.

W. BARTLETT, *Clerk*,
pr. CHAS. S. CAPP, *D. C.*

Judgment.

In the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco.

CORNELIUS J. EATON
vs.
JOSEPH C. PALMER, administrator of the estate of Franklin C. Gray, MATILDA C. GRAY and FRANKLINA C. GRAY;
and
257 WILLIAM H. GRAY
vs.
JOSEPH C. PALMER and CORNELIUS J. EATON, administrators of the estate of Franklin C. Gray, deceased, MATILDA C. GRAY and FRANKLINA C. GRAY.

These consolidated actions being regularly and duly called in their order on the callendar for trial at the April term, A. D. 1861, of this court, and said Cornelius J. Eaton being duly in open court, and failing to appear, and no one appearing on his behalf, the defendants appearing by their attorneys, Hall McAllister and W. W. Crane, jr., and asking for the dismissal of this action of said Cornelius J. Eaton *vs.* Palmer and others above named, because of the premises—

Now, on application of said attorneys, it is hereby adjudged and decreed, by reason of the premises, that the action and complaint of Cornelius J. Eaton *vs.* Joseph C. Palmer and others herein, defendants, be, and the same is hereby, dismissed with costs in favor of the defendants, and the judgment is entered accordingly.

Decree entered June 17th, A. D. 1861.

Decree of dismissal.

258 In the district court of the fourth judicial district of the State of California.

William H. Gray
vs.
Cornelius J. Eaton and Joseph C. Palmer, administrators of the estate of Franklin C. Gray, deceased, Matilda C. Gray, Franklina C. Gray, and James Gray;
and
Cornelius J. Eaton
vs.
Joseph C. Palmer, administrator of the estate of Fra. C. Gray, deceased, Matilda C. Gray, Franklina C. Gary, and William H. Gray.

This cause having been regularly called in its order on the callendar of the court, at a regular term thereof, held on the first Monday of April, A. D. 1861, the plaintiff, William H. Gray, appeared by J. B. Crockett, esq., his counsel, and the defendant appeared by Hall McAllister, esq., and W. W. Crane, esq., their counsel; and the said Cornelius J. Eaton having been duly called in open court did not appear, either in person or by attorney.

259 Whereupon the said defendants appeared by their aforesaid counsel, and moved that the complaint and action of the said Cornelius J. Eaton be dismissed; and no one appearing, the said complaint and action of the said Cornelius J. Eaton was ordered to be dismissed with costs, and the decree to that effect was entered accordingly.

And the said counsel for the defendants then moved the said complaint, and said action of plaintiff, William H. Gray, be also dismissed with costs; and after hearing argument by Hall McAllister in favor of said motion, and by said J. B. Crockett in opposition thereto, it was ordered that said motion stand over for further argument until Saturday, April 6th, A. D. 1861.

And on this sixth day of April, pursuant to said order, came the plaintiff, William H. Gray, by J. B. Crockett, his attorney, and the defendants by Hall McAllister, their counsel, and after due deliberation had—

It was ordered that said motion to dismiss the complaint and action of the plaintiff, William H. Gray, herein, be granted.

It is therefore adjudged and decreed that the said complaint and action of said William H. Gray be, and the same is hereby, 260 dismissed with costs, and judgment herein is so ordered accordingly in favor of the defendants and against the plaintiffs.

JOHN S. HAGER, *Judge.*

Endorsed : Filed April 8th, 1861.

W. BARTLETT, *Clerk*,
pr. C. S. CAPP, *D. C.*

Judgment.

In the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco.

WILLIAM H. GRAY
vs.
CORNELIUS J. EATON and JOSEPH C. PALMER, administrators of the estate of Franklin C. Gray deceased, MATILDA C. GRAY, FRANKLINA C. GRAY, and JAMES GRAY, and
CORNELIUS J. EATON
vs.
JOSEPH C. PALMER, administrator of the estate of Franklin C. Gray, deceased, MATILDA C. GRAY, FRANKLINA C. GRAY, and MATILDA C. GRAY.

261 This cause having been regularly called in its order for trial on the calendar of the court, at a regular term thereof, held on the first Monday of April, A. D. 1861, the plaintiff, William H. Gray, appeared by J. B. Crockett, esq're, his counsel, and the defendants appeared by Hall McAllister, esq're, and W. W. Crane, esq're, their counsel, and the said Cornelius J. Eaton having been duly called in open court, did not appear either in person or by attorney.

Whereupon the said defendants appeared by their aforesaid counsel, and moved that the complaint and action of the said Cornelius J. Eaton be dismissed ; and no opposing, the said complaint and action of the said Cornelius J. Eaton was ordered to be dismissed with costs, and the decree to that effect entered accordingly.

And the said counsel for the defendants then moved that the said complaint and said action of plaintiff, William H. Gray, be also dismissed with costs, and after hearing argument by Hall McAllister in favor of said motion, and by said J. B. Crockett in opposition thereto, it was ordered that said motion stand over for further argument until Saturday, April 6th, A. D. 1861.

And on this sixth day of April, pursuant to said order, came 262 the plaintiff, William H. Gray, by J. B. Crockett, his attorney, and the defendants, by Hall McAllister, their counsel, and after due deliberation had—

It was ordered that said motion to dismiss the complaint and action of the plaintiff, William H. Gray, herein, be granted.

It is therefore adjudged and decreed that the said complaint and the action of said William H. Gray be, and the same is hereby, dismissed with costs, and judgment herein is ordered accordingly, in favor of the defendants and against the plaintiff.

Decree entered June 17th, A. D. 1861.

District court of the fourth judicial district of the State of California, in and for the city and county of San Francisco.

William H. Gray *vs.* Cornelius J. Eaton *et al.*,
and
Cornelius J. Eaton *vs.* Joseph C. Palmer.

City and County of San Francisco, *ss:*

263 I, Washington Bartlett, county clerk of the city and county of San Francisco, State of California, and ex officio clerk of the district court of the fourth judicial district thereof, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause, and recorded in judgment book E, of said court, at page 298 and 299. And I further certify that the foregoing papers, hereto annexed, constitute the judgment roll in said cause.

[SEAL.] Witness my hand and the seal of said district court this 17th day of June, A. D. 1861.

WASHINGTON BARTLETT,
By MORRIS J. MARSHUETZ,
Deputy Clerk.

Filed this 17th day of June, A. D. 1861.

WASHINGTON BARTLETT,
By MORRIS J. MARSHUETZ.

264 In the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco.

William H. Gray *vs.* C. J. Eaton *et al.*,
and
Cornelius J. Eaton *vs.* J. C. Palmer *et al.*
Consolidated actions.

I, Washington Bartlett, county clerk of the city and county of San Francisco, and ex officio clerk of said district court, do hereby certify that the foregoing are full, true, and correct copies of various original papers on file in my office in the above-entitled cause, and that the same constitutes a full, true, and correct copy of the judgment roll in said cause and the whole thereof.

[SEAL.] In witness whereof, I have hereunto set my hand and affixed the seal of said district court, this 22nd day of November, A. D. 1861.

WASHINGTON BARTLETT, *Clerk.*

265 In the district court of the —— judicial district of the State of California, in and for the city and county of San Francisco.

William H. Gray *vs.* C. J. Eaton *et al.*, and Cornelius J. Eaton *vs.* J. C. Palmer *et al.* } Consolidated actions.

I, John S. Hager, judge of said district court, do hereby certify that said court is a court of record, having a clerk and seal; that Washington Bartlett, who has signed the said attestation, is the duly elected and duly qualified county clerk of the city and county of San Francisco, and ex officio clerk of said district court; that said signature is his genuine handwriting; that all his acts as such clerk are entitled to full faith and credit; and that said attestation is in due form of law.

[SEAL.] Attest my hand and the seal of said court this 28th day of November, A. D. 1861.

JOHN S. HAGER,
District Judge, 4th Judicial —— of the State of California.

Endorsed: Fourth district court, State of California.

266 *Judgment roll.*

Gray *vs.* Eaton *et al.*, and Eaton *vs.* Palmer *et al.* }

To which the counsel for the plaintiff, Franklina C. Gray, objected, on the ground that said Franklina had no notice of and was not properly made a party to said suit, and that for want of any valid appearance of or service, upon the said Franklina, the said proceedings, and the decree in the said cause, were void as to her: And thereupon the defendants called Otmar Caler as a witness, who testified that during the whole month of February, 1854, he was a deputy clerk of the district court of the fourth judicial district, in and for the city and county of San Francisco; that the summons in the judgment roll aforesaid, bearing date February 14, 1854, is in the handwriting of, and was issued by, the witness, as such deputy clerk; that by reference to the register of actions in said cause, it appears that the complaint in the case of William H. Gray *vs.* Palmer, adm'r, *et als.*, was filed on the 15th day of February, 1854; that it was the
267 practice of the witness never to issue a summons in a cause until after the complaint was filed; that the practice in said office then was, in case there were several defendants, to issue an original summons, directed to each separate defendant, and a copy of each summons to be delivered to the defendants severally; that be-

sides the summons in the judgment roll, directed to C. J. Eaton, a similar summons was issued, directed to the defendant Palmer; that from an entry on the register in the handwriting of the witness, dated 18th February, 1854, it appears that this summons was returned by the sheriff as served on Palmer on that day; that it was the practice of the witness to make such entries from the sheriff's return, and this entry on the register would not have been made except from the sheriff's return; that in 1854, and prior to that time, the fees charged in that office were, for issuing each summons $1 50, for each copy $1 50, and for filing returned and certificate of filing $1 50, making in all $4 50 for each summons, copy, filing, and certificate of filing; that after the lapse of so many years he had no recollection, except from the entries on the register in his own handwriting, as to
268 the day on which the summons actually issued, but it was his practice never to issue a summons until after the complaint was filed.

To all which the plaintiff objected on the ground that said evidence was immaterial and inadmissable, and that the record could not be aided, amended, or added to by parol evidence; but the court overruled the objections, to which the plaintiffs excepted.

The defendants then called R. C. Hopkins as a witness, who testified that on and prior to the 15th February, 1854, he was a deputy in the office of the clerk of the aforesaid fourth district court; that the endorsement on the back of the complaint in the case of William H. Gray *vs.* Palmer, adm'r, *et als.*, stating the time of filing the same, is in the handwriting of the witness; that it was a part of the duties of the witness to receive the complaints, mark them as filed, enter them in the register of actions, and make the charges and entries relating thereto in the register. Being shown the said register, he testified that on the left-hand column of the page on which the case of Wm. H. Gray *vs.* Palmer, *et als.* was registered, he finds the following entry in his handwriting, under the title of the case, to
269 wit: "Feb'y 15, complaint filed and summons issued," which is the only entry in that column in his handwriting; but in the right-hand column of the same page he finds in his handwriting the following entries, which are the first in that column, to wit:

"Court tax	$3 00
"Entering cause, two copies of complaint	37 00
"Summons, copies, filing, and certificates	11 50."

That these entries have no date opposite them, but the custom was to make these entries at the time the complaint was filed; but witness cannot recollect how it was in this cause, except from his uniform custom; that he cannot now remember the particular items which made up the charge of $11 50 for summons, copies, filing, and certificate, but according to the usual rates of charging it was intended to cover the charges for at least two original summons, copies, filing, and certificates.

To the admission of all which testimony the plaintiffs objected at the time, on the ground that it was immaterial and incompetent, and that the record could not be aided, added to, or amended by parol evidence; but the court overruled the objection and the plaintiffs excepted at the time.

270 The defendants then called L. Humphrey as a witness, who testified, that he is the same L. Humphrey whose name appears to the affidavit in the aforesaid judgment roll, certifying to the publication, in the "Daily Times and Transcript" newspaper, of the summons in the case of William H. Gray *vs.* Palmer, adm'r, *et als.* The defendants then offered to prove by said witness that at the time of making said affidavit, and at the date thereof, he was the principal clerk in the office of said newspaper :

To which the plaintiff objected, on the ground that it was immaterial and inadmissible, and that the record could not be aided, amended, or added to by parol evidence ; and the court sustained the objection and ruled out said testimony, to which ruling the defendants excepted at the time.

The defendants then offered in evidence the following papers from the files in the case of Wm. H. Gray *vs.* Palmer, adm'r, *et als.*, to wit :

1st. A petition by William H. Gray for the appointment of a guardian *ad litem*, for the infant defendant, Franklina C. Gray, dated 16th December, 1854, as follows :

271 District court, 4th judicial district, county of San Francisco.

WILLIAM H. GRAY }
vs. }
EATON *et al.* }

The petition of the above-named plaintiff respectfully showeth to the court that ——— Gray, an infant daughter of Franklin C. Gray, deceased, and whose christian name is unknown to the plaintiff, is one of the defendants in said cause, and is residing in the State of New York; that publication has been duly made against said infant according to law, and that said infant is under the age of fourteen years.

Wherefore your petitioner prays that a guardian *ad litem* be appointed by the court to defend the said cause on behalf of the said infant defendant.

Dated at San Francisco, 16th Dec'r, 1854.

WM. H. GRAY,
By CROCKETT & PAGE,
His Attorneys.

Endorsed : 4th district ; Wm. H. Gray *vs.* Eaton *et al.* Petition for appointment of guardian *ad litem.*

CROCKETT & PAGE, *for Pl'ff.*

Filed Dec'r 16, 1854.

WOOD, *D. C.*

272 2nd. The order of the judge of the same date appointing said guardian, which order is as follows :

District court, 4 district.

WILLIAM H. GRAY
vs.
EATON *et al.*

On the petition of the plaintiff it is ordered by the court that H. S. Foote be appointed. and he is hereby guardian *ad litem* for ——— Gray, infant daughter of Franklin C. Gray, dec'd, to defend on behalf of said infant in the above-entitled cause.

DELOS LAKE, *Dist. Judge.*

Endorsed : District court, 4th dist. Gray *vs.* Eaton *et al.* Order appointing guard'n *ad litem.*
Filed Dec'r 16, 1854.

WOOD, *D. C.*

3rd. A stipulation bearing date the 28th day of February, 1856, in the words and figures following, to wit :

273 In the district court of the 4th judicial district.

WILLIAM H. GRAY, plaintiff,
vs.
JOSEPH C. PALMER, adm'r of Franklin C. Gray, dec'd, MATILDA C. GRAY widow of said F. C. Gray, FRANKLINA C. GRAY, infant heir of said F. C. Gray, dec'd, and CORNELIUS J. EATON, def'ts.
C. J. EATON
vs.
WILLIAM H. GRAY, *et als.*

Same court.

In the above-entitled causes it is hereby mutually agreed and stipulated between the respective parties thereto as follows, to wit :

1st. That the report as prepared by James D. Thornton, the referee therein, and now in his hands ready to be filed, or which is nearly completed and will be ready for filing within the next few days, be filed by him as soon as the same is complete, and the several parties aforesaid do hereby waive all exception to said report, and consent that the same be confirmed by an order of said court and stand as final and conclusive between the parties.

2nd. The said plaintiff, William H. Gray, hereby agrees and stipulates, that on the filing and confirmation of said report as aforesaid he will abate from the amount found by said report to be due 274 to him from the estate of said F. C. Gray, dec'd, the sum of five thousand dollars, and the said Cornelius J. Eaton, on his part, agrees and stipulates that he will in like manner abate from the amount found by said report to be due to him from said estate the sum of two thousand dollars, which abatements shall be entered of record in said cause.

3rd. It is mutually agreed between all the parties, that the cost of a tombstone or monument erected to the memory of said F. C. Gray, amounting to the sum of nine hundred dollars or thereabouts, be paid by the administrator out of the funds of the estate before distribution, and that the same be a charge upon the estate generally.

4th. It is further mutually agreed, that as to the balances found by said report to be due from said estate to the said William H. Gray and the said Cornelius J. Eaton, respectively, after the abatements aforesaid, the same shall be adjusted and settled as follows, to wit, the said William H. Gray and Cornelius J. Eaton, shall each, for himself, designate in writing such portion or portions of the real estate belonging to the estate of said F. C. Gray, deceased, as shall in their opinion, at a fair and reasonable cash value, be about sufficient to cover the said balances respectively due to said
275 Gray and Eaton; and with a view to ascertain such reasonable
cash value it is agreed that the property so to be designated be appraised at its fair reasonable cash value by John C. McLemore, Richard H. Sinton and John P. Overton, or a majority of them, who are mutually chosen for that purpose, and that the said Gray and Eaton bind themselves, each for himself, that the property so designated by each, respectively, or so much thereof as shall be necessary to cover said balances, respectively, shall bring at the sale hereafter to be made of said estate, under the orders of the court for the distribution thereof, at least as much as its appraised value, ascertained as aforesaid. It is understood that this agreement is applicable to both the cases, the titles whereof are given in the caption, and which have been consolidated by an order of court; and whenever the balances due to said William H. Gray are referred to in this instrument, it is intended to refer only to the sums found by said report to be due to said Gray and Eaton from the estate of said F. C. Gray, over and above their general interest in said copartnerships.

In testimony whereof, the parties aforesaid have hereunto set their hands this 28th Feb'y, 1856.

276 H. T. FOOTE,
Attorney for the Administrator and for Matilda C. Gray,
and guardian ad litem for Franklin C. Gray.
WILLIAM H. GRAY,
By CROCKETT & PAGE,
His Attorneys.
C. J. EATON.
CHAS. H. S. WILLIAMS,
Attorney for J. C. Palmer, Administrator, &c.
JOSEPH C. PALMER,
Administrator.

Endorsed: In 4th district court.

WILLIAM H. GRAY
vs.
JOSEPH C. PALMER and others ; and
CORNELIUS J. EATON
vs.
WILLIAM H. GRAY and others.

Stipulation.

To the admission of each and every of which documents in evidence the plaintiffs objected, on the ground that the same were incompetent and irrelevant evidence, to add to or contradict the judgment roll ; but the court overruled the objection, and admitted said documents in evidence, to which ruling the plaintiffs excepted at the time.

277 The defendants then offered to read in evidence from the original book of the proceedings of said district court of the fourth judicial district the following entry therein :

"In the district court of the fourth judicial district, William H. Gray *vs.* C. J. Eaton *et al.* Order for publication of summons and complaint.

It appearing to the satisfaction of the court that ——— Gray, whose Christian name is unknown, infant daughter of Franklin C. Gray, deceased, resides out of this State, and that she is a necessary party to the above-entitled action, it is ordered that summons against said infant, to be published in the Placer Times and Transcript, a newspaper published in the city of San Francisco, once a week for three months.

It is further ordered that a copy of the summons and complaint be forthwith deposited in the post office, at San Francisco, directed to ——— Gray, infant daughter of Franklin C. Gray, deceased, to the care of Matilda C. Gray, her mother, Brooklyn, New York."

To which the plaintiffs objected, on the ground that the same was incompetent and irrelevant, but the court overruled the objection and admitted the said entry to be read in evidence, to which ruling the plaintiff excepted at the time.

278 The complaint of C. J. Eaton, in the case of Cornelius J. Eaton *vs.* J. C. Palmer *et al.*, omitted from the judgment roll in the consolidated action, was also read in evidence, of which the following is a copy :

In the district court of the fourth judicial district, county of San Francisco.

CORNELIUS J. EATON, plaintiff,
vs.
JOSEPH C. PALMER, administrator of the estate of Franklin C. Gray, deceased, MATILDA C. GRAY, and FRANKLINA C. GRAY, infant child of the said Franklin C. Gray, dec'd, defendants.

Cornelius J. Eaton, the above-named plaintiff, complains of the above-named defendants, and avers and shows to the court as follows:

That the said Franklin C. Gray, in the latter part of the year A. D. 1850, in consequence of good and faithful services rendered to him by the said plaintiff as clerk in a banking-house which the said Franklin C. Gray, in partnership with Grove Cook, McMickle had had in
the city of San Francisco, under the style of Gray, McMickle,
279 and as one of the assignees of the said firm after they had
surrendered all their property for the benefit of their creditors, the said Eaton discharging (discharging) his duties as such assignee, so as to save a considerable amount of property for the said Franklin C. Gray without making any charge for his services as such assignee, and also of many acts of friendship which the said Eaton had done him in lending him considerable sums of money at times when he stood in need of such aid, and when the said Eaton could ill spare it; and also in consideration of other favors and other valuable services rendered by the said Eaton to the said Franklin C. Gray; and also of the latter's confidence in and knowledge of the integrity, industry, and capacity for business of the said Eaton, proposed to him, the said Eaton, that he, Franklin C. Gray, and he, the said Cornelius J. Eaton, should form a general partnership, which should embrace all their property and business, upon certain terms and considerations, then verbally specified; that the said Eaton accepted the proposition, and thereupon a partnership in the business of purchasing
real estate and other lawful speculations was accordingly
280 formed and entered into between them; that the terms of the
said partnership were afterwards substantially put in writing in a certain agreement, contract, or conveyance, duly signed, sealed, and delivered, and acknowledged by the said Franklin C. Gray, and recorded; all of which terms and matters and things, by reference to the said agreement, contract, or conveyance, which the said Eaton is ready to produce when thereunto required, and whereof a correct copy is annexed, marked "Exhibit A," and made a part of this complaint, will appear.

That by the terms and considerations of the said agreement, contract, or conveyance the said Eaton became and was and is lawfully and equitably entitled to and is the just and lawful owner of one undivided fourth part, right, and interest of, in, and to all the property, both real and personal, of which he, the said Franklin C. Gray, was then in anywise seized, or posessed, or entitled to; and also the one-fourth part of all property, both real and personal, which he, the said Franklin C. Gray, should or has since become possessed of, in, or in anywise entitled to during the existence of the said partnership or business connection.

281 That the said Cornelius J. Eaton, and the said Franklin C. Gray, from and after the formation of the said partnership or business connection until the death of said Franklin C. Gray, carried on and conducted all their business and concerns in accordance with intention, spirit, and provisions of the said agreement or contract.

That the said Franklin C. Gray died on or about the 15th day of

July, A. D. 1853; that all the joint and common or partnership property of the said Franklin C. Gray and Cornelius J. Eaton, which consisted of a large amount of real estate, personal property, claims, judgments, choses in action and so forth, a schedule or inventory of which is hereunto attached and made part of this complaint, marked Exhibit 13, was then and still is standing under and in the individual name of the said Franklin C. Gray, that the same was and is, and was and is held as in truth and fact and in equity. The joint and common or partnership property of, and belonging to the said Cornelius J. Eaton, and the said Franklin C. Gray in his lifetime, now to his said estate, jointly and in the following proportion, to wit:
the one undivided fourth part of the whole belonging to and
282 being the property of the said Cornelius J. Eaton, and the
remaining three-fourths to the said Franklin C. Gray in his lifetime, now to his said estate; that the same appears and is evidenced under and by virtue of the said agreement, conveyance, or contract, and the acts and things done and performed in pursuance of the said partnership or business connection which existed as aforesaid between the said parties, Franklin C. Gray and Cornelius J. Eaton. That besides and in addition to the said one-fourth part of the said joint and common or partnership property of the said Franklin C. Gray and Cornelius J. Eaton, to which he the said Eaton is entitled, and according to the terms and conditions of the said agreement or contract, and the partnership or business connection entered into between the said parties as aforesaid, the said plaintiff avers that he is also and in like manner further entitled to sundry claims and demands on and against the estate of the said Franklin C. Gray, deceased, for and on considerable sums of money furnished and advanced out of the proceeds of the said joint and common or
partnership property to the said Franklin C. Gray in his life-
283 time, for and applied to his the said Franklin C. Gray's indi-
vidual uses and benefit over and above and exceeding his, the said Franklin C. Gray's respective share of the said proceeds. That the amount due to the said Eaton on such account, and by reason of such excess of moneys so furnished and advanced to and appropriated by the said Franklin C. Gray in his lifetime as aforesaid, as equal to the sum of ten thousand seven hundred and seventy & $\frac{17}{100}$ dollars, for a full statement of the particulars of which reference is hereby to "Exhibit C," which is made a part of this complaint and hereto attached.

That the said Franklin C. Gray died on or about the 15th day of July, 1853, leaving a surviving widow, the said Matilda C. Gray, and also an infant child, subsequently born, the said Franklina C. Gray, both of whom are residents and citizens either of the State of New York, or of the District of Columbia, and are neither of them residents or citizens of the State of California.

That letters of administration upon the estate of the said Franklin C. Gray have been granted by the probate court of the county of
San Francisco, to the defendant Joseph C. Palmer, and the
284 plaintiff, Cornelius J. Eaton, as co-administrators, who duly

qualified and took upon themselves the duties of the said trust, but that the said Eaton has recently resigned for himself the said trust and appointment, and has been lawfully and fully discharged by the said probate court from all connection with or disqualification on account of his said late administratorship, and that the said Joseph C. Palmer is now the sole and only administrator of the estate of the said Franklin C. Gray, deceased.

That the said plaintiff does not know of any liens or mortgages upon the said partnership property.

Wherefore the said plaintiff, Cornelius J. Eaton, prays that the said Joseph C. Palmer, as administrator of the estate of the said Franklin C. Gray, dec'd, Matilda C. Gray, and the said infant child, Franklina C. Gray, by guardian or otherwise, be made defendants hereto, and be required to interplead and exhibit their respective interests in the said joint and common or partnership property and assets; that the said partnership or business connection be adjudged to be dissolved, and that the accounts thereof be finally adjusted and settled according to the respective rights of the parties
285 interested. And particularly that the rights, interests, and claims of the said Cornelius J. Eaton, both in law and in equity in and to any and all of the said property, business, and assets be ascertained, settled, and determined by the final judgment and decree of this court.

And that so much of the same as shall be found to belong to the said Eaton, or to which he may be in anywise entitled, be *finally adjudged*, *decreed*, and confirmed and set apart to him.

And that such additional amounts due as aforesaid upon account between him and the said Franklin C. Gray, or the representatives of his said estate, be ascertained, and determined, and adjudged, and decreed to him the said Eaton.

And that in pursuance of the relief, or any or all of the relief herein prayed for, the joint and common, or partnership property aforesaid, be sold under the proper order and decree of this court, and that such other and further relief be granted to the plaintiff as in law and equity he is entitled to.

GLASSELL & LEIGH,
Att'ys for Pl'ff.

286 STATE OF CALIFORNIA,
County of San Francisco, ss:

Cornelius J. Eaton, the above plaintiff, being duly sworn, says that he foregoing complaint has been read by him, and that he knows its ontents, and that the same is true of his own knowledge, except as the matters therein stated on information, and as to those matters e believes it to be true.

C. J. EATON.

Sworn and subscribed this 14th day of April, 1855, before me,
JOHN C. CORBETT, *D. Clerk.*

The defendants then again offered to read in evidence the judgment roll aforesaid, to which the plaintiff, Franklina C. Gray, by her counsel, objected, on the ground that, as to her, the proceedings and decree in the said cause were null and void, for the reason that she was never served with process therein, nor made a party thereto, either personally or by publication; that the said judgment roll
was the record of two actions consolidated into one, to wit:
287 the actions of William H. Gray *vs.* Cornelius J. Eaton, *et al.*,
and the action of Cornelius J. Eaton *vs.* Joseph C. Palmer, *et al.*

That by the decision of the supreme court of California in said action, the infant, Franklina C. Gray, had not been served with the summons and complaint in the action of Cornelius J. Eaton *vs.* Joseph C. Palmer, *et al.*, and so much of the judgment roll, and the decrees therein contained, as were founded upon the summons and complaint of said Cornelius J. Eaton, could not be read in evidence as against the said Franklina C. Gray.

That the authority to sell, in said decrees contained. could not be apportioned between said causes, so that a part of the authority to sell out be read, and a part not.

That in the case of William H. Gray *vs.* Cornelius J. Eaton, and others, the said judgment roll showed no jurisdiction acquired in said cause over Franklina C. Gray, for that the record showed she was a non-resident, beyond the territorial limits of the State of California.

That the summons in said last-mentioned case did not contain the
name of Franklina C. Gray.

288 That the summons therein directed to be served by publication did not contain the same of said Franklina C. Gray.

That no original summons therein, under seal, addressed to said Franklina C. Gray, appears in said record or judgment roll.

That the said original summons therein was not amended so as to make said Franklina C. Gray a party, either by order of court or other legal authority.

That the summons in said case of William H. Gray *vs.* Cornelius J. Eaton, *et al.*, does not specify the county where the complaint was filed.

That in said last-mentioned case there is no proof in said record, which summons and complaint, if there was more than one, was deposited in the post office for Franklina C. Gray.

That there was no proof in said record that the person who made the affidavit of publication in said cause was the printer, foreman, or principal clerk of any newspaper.

That such proof could only appear from such affidavit.

That publication of the said summons was not made for the period of three months.

That said summons and complaint were not deposited "forthwith"
in the post-office, as required by statute.

289 That a minor cannot be served by publication.

That said judgment roll was wholly defective and failed to shew any jurisdiction acquired over said infant, Franklina C. Gray.

And the court having taken said objections under advisement, sustained said objections and ruled that the said Franklina C. Gray has not been served with summons in the said consolidated action, nor brought into court therein, and that said judgment roll was no record as to her, and could not be read against her.

To which ruling, and every part and portion thereof, the counsel for the defendants duly excepted.

And the plaintiff, Matilda C. Gray, by her counsel, objected to the admission of said judgment roll in evidence as against her, on the ground that the decree in the said cause was a joint decree against the said Matilda and the said Franklina, and being void as to the latter was void in toto; that the said decrees in said judgment roll contained did not identify the premises described in the complaint herein, nor order them to be sold.

That the said decrees did not find that said premises were partnership property, nor order them to be sold as such.

That the said premises were real estate of the said heirs, 290 and not personal property of any partnerships.

That the fourth district court had no power to order a sale or a conveyance of said real estate.

That said fourth district court had no power to divest the legal title of these plaintiffs by authorizing a commissioner to convey the same.

That said decrees operated to confer no legal title to said premises upon said James D. Thornton.

But the court admitted the judgment roll in evidence, subject to such charge as should be given by the court to the jury, in respect to its legal effect.

The defendants then read in evidence a deed from J. D. Thornton. commissioner, to Brignardello and Roncati, the execution of which deed by James D. Thornton was admitted; but the plaintiff expected that said deed was irrelevant and incompetent to shew any legal title in the defendants, for that the said James D. Thornton had no power to convey, and could not by said deed convey away the legal title of these plaintiffs, but the court overruled said objections, and allowed said deed to be read in evidence, to which ruling the plaintiff's counsel then and there duly excepted.

291 The defendent then read in evidence to the jury a deed from said Roncati to the said Brignardello.

Which two deeds are in the words and figures following:

Whereas, by virtue of a decree entered on the twenty-seventh day of October, A. D. eighteen hundred and fifty-five, in the district court of the fourth judicial district of the State of California, in the suits of William H. Gray *versus* Joseph C. Palmer, administrator of Franklin C. Gray, deceased, and others, and Cornelius J. Eaton *versus* Joseph C. Palmer, administrator of Franklin C. Gray, deceased, and others. James D. Thornton was appointed commissioner to sell at public auction for cash, to the highest bidder, the real and personal property therein referred to, and execute to the purchasers of the said real estate all legal and proper conveyances for the same, according to the terms of said decree. And whereas, at a sale of

the said real property afterwards had at the sales room of Wainwright, Randall & Co., on the third day of May, A. D. eighteen hundred and fifty-six, since approved and confirmed by a decretal order of said district court entered on the fourteenth day of May,
A. D. eighteen hundred and fifty-six, in said suits, Santiago
292 Brignardello and Francisco Roncati were the highest bidders
for that portion of the real estate hereinafter described, and became the purchasers of the same for the sum of seventy-four hundred and twenty-five dollars.

Now therefore this indenture, made this twenty-six day of May, A. D. eighteen hundred and fifty-six, between James D. Thornton, commissioner as aforesaid, party of the first part, and Santiago Brignardello and Francisco Roncati, parties of the second part, witnesseth, that for and in consideration of the premises, and the payment of the said sum of seventy-four hundred and twenty-five dollars by the parties of the second to the party of the first part, the receipt whereof is hereby acknowledged before the ensealing and delivery of these presents, the party of the first has transferred and conveyed, and by these presents doth transfer and convey to the parties of the second part all the right, title, and interest of the parties to the said suits, and of any and either of them, in and to the following described real estate, situate, lying, and being in the city and State aforesaid, to wit: All that lot of land commencing at a point on the east line of Dupont street, distant forty feet north from
the north line of Pacific street; thence running easterly fifty-
293 eight feet; thence at right angles southerly forty feet to the
said line of Pacific street; thence westerly along Pacific street fifty-eight feet to the said line of Dupont street; thence northerly along Dupont street forty feet to the point of commencement, being a portion of 50 vara lot No. 66, (sixty-six,) as per official map of the city of San Francisco.

To have and to hold the above described property, together with the appurtenances thereto belonging, or in any way appertaining, to he said parties of the second part and their heirs forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and date last above written.

JAMES D. THORNTON, [SEAL.]
Commissioner.

STATE OF CALIFORNIA, *County of San Francisco, ss:*

On this 29th day of May, A. D. one thousand eight hundred and fifty-six, before me Rob't C. Rogers, a notary public in and for said county, personally appeared James D. Thornton, commissioner, to
me known to be the individual described in, and who executed
294 the annexed instrument, and acknowledged that he executed
the same freely and voluntarily for the uses and purposes therein mentioned, as commissioner aforesaid.

Witness my hand and official seal the day and year first above written.

ROB'T C. ROGERS,
Notary Public.

[SEAL.]

999

Recorded in county recorder's office, San Francisco county, May 29th, 1856, at 12½ o'clock p. m., in liber 60 of deeds, page 386.

F. D. KOHLER, *County Recorder.*
By GEO. F. KOHLER, *Deputy.*

Endorsed: Deed, James D. Thornton, commissioner, to S. Brignardello and F. Roncati, dated May 26th, 1856. Recorded at request of Brignardello and Roncati, May 29th, 1856, at 12½ o'clock p. m., in liber 60 of deeds, page 386.

295 Whereas, on the eighteenth day of April, A. D., eighteen hundred and fifty-seven, Wainwright, Randall & Co., auctioneers of and in the city and county of San Francisco and State of California, did sell at public auction in said city, to the highest bidder for cash, the hereinafter described piece and parcel of land; and whereas Santiago Brignardello was the highest bidder for the same, and became the purchaser for the sum of eleven thousand six hundred and fifteen dollars: Now, therefore, this indenture, made this eighteenth day of April, A. D. eighteen hundred and fifty-seven, by and between Francisco Roncati, party of the first part, and Santiago Brignardello, party of the second part, witnesseth: That for and in consideration of the premises and the payment of the said sum of five thousand eight hundred and seven dollars and fifty cents by the party of the second part, paid to the said parties, Wainwright, Randall & Co., auctioneers, the receipt whereof is hereby acknowledged by the said party of the first part, before the execution of these present, the said party of the first part has bargained, sold, released, remised, and conveyed, and by these presents doth bargain, sell, release, remise, and convey unto the said party of the 296 second part, and to his heirs and assigns forever, all his right, title, interest, claim, and demand in and to that certain piece and parcel of land with all the buildings and improvements thereon, bounded and described as follows, to wit: Commencing at a point on the east line of Dupont street, distant forty feet north from the north line of Pacific street; thence running easterly fifty-eight feet; thence at right angles southerly forty feet to the said line of Pacific street; thence westerly along Pacific street fifty-eight feet to the said line of Dupont street; thence northerly along Dupont forty feet to the point of beginning, the same being a portion of fifty vara lot number sixty-six, as laid down upon the official map of the said city of San Francisco, and was conveyed by James D. Thornton, commissioner, to the parties of the first and second part hereto, by deed bearing date the twenty-sixth day of May, A. D. 1856, and recorded in the office of the recorder of San Francisco county on the 29th day of May, A. D. 1856, in liber 60 of deeds, page 386—to have and to hold all and singular the above mentioned and described premises unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part has here- 297 unto set his hand and seal this eighteenth day of April, A. D. eighteen hundred and fifty-seven.

The words "*eleven,*" "*six,*" and "*fifteen*" erased, and the words "*five,*" "*eight,*" "*seven,*" and "*fifty cents*" interlined before execution.

FRANCISCO RONCATI. [SEAL.]

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this thirteenth day of April, A. D. 1857, before me, personally appeared Francisco Roncati, personally known to me to be the individual described in and who executed the foregoing instrument, and who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein expressed.

[SEAL.] In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

L. W. SLOAT,
Notary Public.

Recorded in county recorder's office, San Francisco, in liber 68 of deeds, page 209, April 30th, 1857, at 3½ o'clock p. m.

F. D. KOHLER,
County Recorder.
pr. JOHN AMES, *Deputy.*

298 Endorsed: F. Roncati to S. Brignardello, deed, April 18, 1857. Recorded at request of S. Brignardello, April 30th, 1857, at 3½ o'clock, p. m. 68 of deeds, page 209.

The defendants then called J. D. Thornton as a witness, who testified as follows, to wit: That he is the same J. D. Thornton named as a commissioner in the judgment roll aforesaid. That as such commissioner he sold the property specified in his report, contained in said judgment roll, and amongst other property the premises described in the complaint in this cause. That at said sale the said last described premises were sold to the defendant Brignardello and one Roncati, for the price and sum specified, as the consideration in the aforesaid deed from the witness, as commissioner, to the said Brignardello and Roncati. That the said purchase money was paid by them to the witness as such commissioner, in cash, at the time of the said sale and purchase. That the said sale was made at auction, in a public place in the city of San Francisco, after due and reasonable notice, by publication in at least one daily newspaper published in said city, and by bills and posters put up in public places
through the said city. That a large crowd of persons was
299 present at said sale, and the bidding was very spirited. That
the said sale was in all respects fairly conducted *conducted*, and in the opinion of the witness the property brought its fair and reasonable value, and beyond what the auctioneers who conducted the sale had estimated its value to be.

The defendants then called T. J. A. Chambers as a witness, who testified that he is and for some years has been a dealer in real estate in the city of San Francisco. That he is a competent judge of the value of real estate in said city; that he was present at the sale referred to by the last witness; that a large crowd was present and there was much competition in bidding; that the property sold brought its full cash value at the time; that he knows the premises described in the complaint in this action, and that said sale, when sold to Brignardello and Roncanti, it brought its full cash value.

The defendants then moved the court to dismiss this action as to the plaintiff Franklina C. Gray, on the ground that it appears from the face of the complaint that the said Franklina is a minor, and
does not sue by a guardian *ad litem* but by her next friend
300 Francis S. Spring, and that no guardian *ad litem* has been ap-
pointed to represent the said minor in this cause: and in support of said motion, read to the court a rule of this court in force when this suit was brought, which rule is as follows:

"66. In all cases where no provision is made by these rules, or by any act of Congress, or provision for which shall not be made by either of them, the forms of remedy shall conform as far as practicable to those prescribed by an act of the legislature of this State, passed the 29th April, 1851, entitled, 'An act to regulate proceedings in the courts of this State,' and the act amendatory thereof, passed 5th May, 1854; provided that no common law pleading in this court shall be sworn to except as prescribed in the 17th common law rule thereof; and further, that nothing contained in either of said legislative acts shall be construed as to authorize a mere equitable right to be prosecuted on the common law side of this court."

Also the following section of the practice act of the State of California, referred to in the rule aforesaid.

"9. When an infant is a party he shall appear by guardian, who may be appointed by the court in which the action is prosecuted, *or by the court in which the action is prosecuted*, or by a judge thereof, or
a county judge."
301 "10. The guardian shall be appointed as follows:
1st. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age upon the application of a relative or friend of the infant.

2d. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years and apply within ten days after the service of the summons, if he be under the age of fourteen or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend to the infant."

Which motion was opposed by the counsel for said Franklina, and in opposition thereto, the said counsel read to the court a rule of this court in force when this action was commenced, as follows:

"17. All matters properly pleadable in abatement shall be set up and pleaded in a separate preliminary answer, in the nature of a plea in abatement, before an answer is put in, to which the plaintiff may reply or demur, and the issue so joined shall be determined by the court before the matters in bar can be pleaded, and when any matters in abatement shall be pleaded in the same answer with

302 matters in bar, or to the merits, or simultaneously with an answer of matters in bar or to the merits, the matters so pleaded in abatement shall be deemed to be waived, and where the matter pleaded in abatement consists of matter of fact, the plea or preliminary answer shall be sworn to."

Also sections 40 to 45, both inclusive of the practice act of the State of California, as follows:

"40. The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either

1st. That the court has no jurisdiction of the person of the defendants or the subject of the action, or

2nd. That the plaintiff has not legal capacity to sue, or

3rd. That there is another action pending between the same parties for the same cause, or

4th. That there is a defect or misjoinder of parties plaintiff or defendant, or

5th. That several causes of action have been improperly united, or

6th. That the complaint does not state facts sufficient to constitute a cause of action, or

7th. That the complaint is ambiguous, unintelligible or uncertain."

"41. The demurrer shall distinctly specify the grounds 303 upon which any of the objections to the complaint are taken, unless it do so it may be disregarded."

"42. The defendant may demur to the whole complaint, or to one of several causes of action stated therein, and answer the residue, or may demur and answer at the same time.

"43. If the complaint be amended, a copy of the amendments shall be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments shall be served upon every defendant to be effected thereby, or upon his attorney, if he has appeared by attorney; and the defendant shall answer in such time as may be ordered by the court, and judgment by default may be entered upon failure to answer, as in other cases.

"44. When any of the matters enumerated in section forty do not appear upon the face of the complaint, the objection may be taken by answer.

"45. If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

Also, the following papers:

304 *To the Hon. M. Hall McAllister, judge of the circuit court of the United States for the districts of California.*

The petition of Philip G. Galpin respectfully showeth unto your honor:

That on or about the 15th day of July, 1853, one Franklin C. Gray died in the State of New York, leaving him surviving a widow, Matilda C. Gray, and a posthumous child, Franklina C. Gray, and leaving also an estate in California, consisting of various lands and tenements. That the said widow and child are the sole heirs at law of the said decedent, but that they have been dispossessed of said property by various parties in this State, who are now in possession thereof.

That the said Matilda C. Gray and Franklina C. Gray are residents of the State of New York, and at present residing there, and that your petitioner is the friend of said infant, and the attorney in fact of the said Matilda C. Gray. That your petitioner, after investigating the various titles to the said divers pieces of real estate, 305 believes it would be for the benefit of said infant if sundry actions of ejectment should be brought in her favor against the different parties in possession of said pieces of real estate, and your petitioner desires and intends to have such actions brought in your honorable court without further delay.

Your petitioner further sheweth that this application is not made by the said Matilda C. Gray, because she is absent in the State of New York, nor by the said infant, because she is now under fourteen years of age, and is also absent in said State.

Your petitioner further sheweth that one Francis S. Spring, a fit and proper person, and a man of substance, is willing to act as next friend for said infant in the aforesaid actions in ejectment, and hath signified his assent thereto in writing, which is hereto annexed.

Wherefore your petitioner prays that the said Francis S. Spring may be appointed *prochein amy* for said infant in said action in ejectment, and that the clerk be directed to enter the proper order in each of said actions accordingly.

Subscribed and sworn before me.

PHILIP G. GALPIN.

306 San Francisco, April 15th, 1861.

CUTLER McALLISTER, *Clerk.*

I herby consent to act as *prochein amy* for the infant, Franklina C. Gray, as prayed in the foregoing petition.

F. S. SPRING.

San Francisco, April 16th, 1861.

SAN FRANCISCO, *April 27th* 1861.

Let the prayer of the above petitioner be granted and the order prayed for be entered accordingly.

M. HALL McALLISTER.
Judge Cir. Court U. S. District Cal'a.

Endorsed: Filed April 27, 1861.

CUTLER McALLISTER, *Clerk.*

I, Henry C. Hyde, clerk of the circuit court of the United States for the districts of California, do hereby certify that the foregoing is a true, full and correct copy of the original petition and order ap-

pointing F. S. Spring as next friend of plaintiff, Franklina C. Gray, in the case of Matilda C. Gray, *et al.*, *vs.* T. J. A. Chambers,
307 *et al.*, now *now* on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 15th day of January, A. D. 1862.

HENRY C. HYDE, *Clerk.*
By CUTLER McALLISTER, *D. C.*

No other authority was produced for the prosecution of this suit by Franklina C. Gray, by said Spring as her next friend, or otherwise.

And thereupon the court overruled said motion, to which ruling the defendants excepted at the time.

It was admitted that all the defendants held and were in possession under the title derived from the deeds of Thornton and Roncati to Brignardello.

The defendants then rested.

It was admitted by the defendants that the plaintiffs and each demanded possession of the premises mentioned in the complaint from the defendants before this action was brought, which was re-
308 fused.

The plaintiff in rebuttal then offered in evidence the following certified copies of orders and proceedings in the said fourth district court.

In the district court of the fourth judicial district of the State of California in and for the city and county of San Francisco.—June term, Tuesday, June 15th, A. D. 1858.

Present: Hon. John S. Hager, judge.

WM. H. GRAY
vs.
C. J. EATON *et al.*, and
C. J. EATON
vs.
JOSEPH C. PALMER *et al.*, defendants.

In the above-entitled causes on motion of Mr. Leigh, one
309 of the attorneys for the defendants, and plaintiff Eaton, and Mr. Crane, the attorney for the defendant, Matilda C. Gray and guardian *ad litem* for the infant defendant, Franklina C. Gray, appearing and consenting thereto, it is ordered that the hearing of the motion of the said Eaton for a retaxation of costs in the said causes be, and the same is hereby, set for Saturday next, the 19th instant, at 10 o'clock in the forenoon of that day, and that all further proceedings upon the execution heretofore issued in the said causes be stayed until the further order of this court.

In the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco.—June term, Saturday, June 19th, A. D. 1861.

Present: Hon. John S. Hager, judge.

William H. Gray
vs.
C. J. Eaton *et al.*,
and
310 C. J. Eaton
vs.
Joseph C. Palmer, *et al.*, defendants.

The order for Matilda C. Gray and Franklina C. Gray, appellants in the above-entitled action, to show cause why the bill of costs on the filing of the remittitur from the supreme court should not be retaxed, coming on to be heard this day, Mr. Leigh for the motion, and Mr. Crane against it, and the same having been argued and submitted, it is by the court ordered that the following items designated in said bill as follows, viz: "Notary fees, $4;" "express fee on remittitur, $1;" "copying and printing briefs for supreme court. $99 20;" and "clerk's fees district court, $7 50;" be disallowed; and the items designated therein as "clerk's fees of district court, $89 50," and "supreme court clerk's fees, $78," be allowed, and that the appellants have execution therefor, and the motion of said Eaton to apportion said costs is hereby denied, to which last ruling said Eaton by his counsel excepts.

311 In the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco.—June term, Saturday, July 24, 1858.

Present: Jno. S. Hager, judge.

William H. Grey
vs.
C. J. Eaton *et al.*

The order to cause herein being returnable this day, W. W. Crane, jr., esq're, attorney for M. C. and F. C. Gray, defendants, moved that judgment be entered herein according to the remittetur of the supreme court, filed in this cause, which motion was opposed by counsel for plaintiff and defendant Eaton, and denied by the court.

In the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco.—August term, Saturday, August 21st, A. D. 1858.

312 Present: Hon. Jno. S. Hager, judge.

William H. Gray *vs.* C. J. Eaton *et al.*,
and
C. J. Eaton *vs.* J. C. Palmer *et al.*

This cause being regularly called in its order upon the law calendar for further proceedings, in pursuance of the remittitur of the supreme court filed in this cause, and the counsel of the respective parties hereto appearing in open court, on motion of W. W. Crane, jr., esq're, attorney for Matilda C. Gray, and guardian *ad litem* for the infant Franklina C. Gray, it is ordered that a new trial of all the issues as to all the parties herein be had, and that this cause be continued for trial at the next (October) term of this court.

To which ruling of the court the counsel of Wm. H. Gray and C. J. Eaton thereupon duly excepted.

313 In the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco.—October term, Tuesday, November 2, A. D. 1858.

Present: Hon. Jno. S. Hager, judge.

William H. Gray *vs.* C. J. Eaton *et al.*,
and
C. J. Eaton *vs.* J. C. Palmer *et al.*

This cause being called for trial in the order upon the court calendar, on motion, and on filing the affidavit of B. W. Leigh, esq're, attorney for C. J. Eaton, and no person objecting thereto, it is ordered that these consolidated causes be, and they are hereby, continued for the term.

In the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco.—February term, Monday, February 4th, A. D. 1861.

314 Present: Hon. Jno. S. Hager, judge.

Henry Newman *vs.* Wm. Bradbury,
Cornelius J. Eaton *vs.* M. C. Gray *et al.*,
Wm. H. Gray *vs.* C. J. Eaton *et al.*,
Titus Webb *vs.* Jessup *et al.*

On motion of counsel, ordered that these causes be placed upon the trial calendar for the present term.

In the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco.—February term, Monday, February 11th, A. D. 1861.

Present: Hon. Jno. S. Hager, judge.

Cornelius J. Eaton *vs.* Wm. H. Gray *et al.*,
Wm. H. Gray *vs.* C. J. Eaton, *et al.*

On motion of Mr. Crockett, of counsel, ordered that these, being improperly upon the calender, be stricken therefrom.

315 In the district court of the fourth judicial district of the State of California, in and for the city and county of Francisco.—April term, Monday, April 1st, A. D. 1861.

Present: Hon. Jno. S. Hager, judge.

CORNELIUS J. EATON
vs.
JOSEPH C. PALMER, adm'r, *et al.*,
and
WM. H. GRAY
vs.
JOSEPH C. PALMER *et al.*

These consolidated actions being regularly and duly called in their order on the calendar for trial at the April term, A. D. 1861, of this court, and said Cornelius J. Eaton being duly called in open court, and failing to appear, and no one appearing in his behalf, and the defendants appearing by their attorneys, Hall McAllister and Wm. W. Crane, jr., and asking for the dismissal of the action of said Cornelius J. Eaton *vs.* Palmer and others above named, because of the premises.

316 Now, upon application of said attorneys, it is hereby adjudged and decreed, by reason of the premises, that the action and complaint of Cornelius J. Eaton *vs.* Joseph C. Palmer, *et al.*, herein defendants, be and the same is hereby dismissed, with costs, in favor of defendants, and the judgment be entered accordingly.

In the district court of the fourth judicial district of the State of California, in and for the city and county of San Francisco.—April term, Monday, April 1st, A. D. 1861.

Present: Hon. Jno. S. Hager, judge.

WILLIAM H. GRAY, plaintiff,
vs.
JOSEPH C. PALMER *et al.*, defendants.

The above-entitled action being regularly and duly called for trial in its order on the calendar of this court, for the April term, A. D. 1861, and McAllister and Crane, attorneys for the defendants, having moved the court that the complaint of Wm. H. Gray be dismissed, with costs, in favor of said defendants, and the court, 317 not being prepared to hear said motion, now on its own motion orders, that the said motion be continued until Saturday, April 6th, A. D. 1861, and that in the event said motion is denied, that said cause be placed upon the equity calendar in its proper order for trial at this term by the court, without a jury.

In the district court of the fourth judicial district of the State of California, in and —— city and county of San Francisco.—April term, Saturday, April 6th, A. D. 1861.

Present: Hon. Jno. S. Hager, judge.

WM. H. GRAY, plaintiff,
vs.
JOSEPH C. PALMER *et al.*, defendants.

The motion to dismiss the plaintiff's complaint herein having come on to be heard this sixth day of April, pursuant to the adjournment heretofore made herein on the first day of April last, after 318 hearing Hall McAllister on the part of the defendants in support of said motion, and J. B. Crockett in opposition thereto, on the part of the plaintiff, it is ordered that the complaint and action herein be, and the same is hereby, dismissed, with costs, and that judgment be entered accordingly.

In the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco.

WM. H. GRAY
vs.
C. J. EATON, *et al.*,
and
CORNELIUS J. EATON
vs.
J. C. PALMER *et al.*

I, Washington Bartlett, county clerk of the city and county of San Francisco, and ex officio clerk of said district court, do hereby certify that the foregoing papers are full, true, and correct copies of all the original orders of court entered upon the minutes of said court, in the above-entitled consolidated causes, since the filing of the remittitur from the supreme court of the State of California, 319 on June 5th, 1858, the same being the last remittitur filed therein.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, this 22d day of November, A. D. 1861.

[SEAL]

WASHINGTON BARTLETT,
Clerk.

In the district court of the 4th judicial district of the State of California, in and for the city and county of San Francisco.

W. H. GRAY
vs.
C. J. EATON *et al.*,
and
CORNELIUS J. EATON,
vs.
J. C. PALMER *et al.*

I, John S. Hager, judge of the said district court, do hereby certify that said court is a court of record, having a clerk and seal; that Washington Bartlett, who has signed the annexed attestation, is the duly elected and qualified county clerk of the city and county of San Francisco and ex officio clerk of said district court; that said signa

ture is his genuine handwriting ; that all his acts as such clerk
320 are entitled to full faith and credit, and that said attestation is
in due form of law.

[SEAL.] Attest my hand and the seal of said district court, this 22nd day of November, A. D., 1861.

JOHN S. HAGER,
District Judge 4th Judicial District of the State of California.

To which the defendants objected, on the ground that they were immaterial and inadmissible evidence, and could not affect the title of the defendants who purchased the premises in controversy whilst the decree was in full force and before its reversal. But the court overruled the objection, to which ruling the defendants then and there excepted.

This was all the evidence in the cause having any relevancy to the points involved in this bill of exceptions, and thereupon the court charged the jury as follows :

1st. That Franklina C. Gray was not served with summons,
321 nor brought into court in the consolidated action of William
H. Gray *vs.* Cornelius J. Eaton, *et al.*, and Cornelius J. Eaton *vs.* Joseph C. Palmer, *et al.*, and that the judgment roll in said action was no record as to her, and therefore that the proceedings and decree in the consolidated action aforesaid, and the sale of the premises in controversy by J. D. Thornton, as commissioner, to Chambers and Page, and the commissioner's deed to them were void as against the plaintiff, Franklina C. Gray, inoperative in law to divest the title of the said Franklina in and to said premises or any part thereof, and that it was the duty of the jury to find a verdict in favor of said Franklina for one undivided half of said premises ; and this, notwithstanding that the said Chambers and Page may have been innocent purchasers for the full value of said premises at said commissioner's sale, and though said sale may have been fairly conducted and free from fraud.

The court further charged the jury that the said decrees, sales, and proceedings in said judgment roll contained were not void as to
Matilda C. Gray, by reason of the want of service of summons
322 therein upon Franklina C. Gray ; to which last-mentioned
charge, and each and every part thereof, the plaintiff's counsel then and there duly excepted.

The court further charged the jury that the said decrees and proceedings sufficiently identified the premises in the complaint mentioned and ordered them to be sold ; to which charge, each and every part thereof, the plaintiff's counsel then and there duly excepted.

The court further charged the jury that the sale under such authority was valid ; to which charge, and each and every part thereof, the plaintiff's counsel then and there duly excepted.

The court further charged the jury that the fourth district court had power in said action to sell the said premises ; to which charge, and each and every part thereof, the plaintiff's counsel then and there duly excepted.

The court further charged the jury that the fourth district court, as a court of chancery, had power in this action to divest the legal title of Matilda C Gray by the deed of James D. Thornton, read in evidence; to which charge, and each and every part thereof, the plaintiff's counsel then and there duly excepted.

323 The court further charged the jury that the said decrees, proceedings, and sales in said judgment roll contained, together with the deed from James D. Thornton, commissioner, to Brignardello and Roncati, operated in law to divest the legal title of the plaintiff, Matilda C. Gray, to the premises described in the complaint herein; to which charge, and each and every part thereof, the plaintiff's counsel then and there duly excepted.

The court further charged the jury that it was their duty to find a verdict against the plaintiff, Matilda C. Gray, and in favor of the defendants; to which charge, and each and every part thereof, the plaintiff's counsel then and there duly excepted.

Whereupon the defendants at the time, and before the jury retired, excepted to so much of said charge as instructed the jury that said Franklina C. Gray was not served with summons nor brought into court in said consolidated actions, and that the said proceedings and decree, and the sale of the said premises by said Thornton, as commissioner, and the deed of the said commissioner to Brignardello and Roncati were void as against the plaintiff Franklina C. Gray,
324 and were imperative in law to divest her title to said premises; and to so much of said charge as instructed the jury to find a verdict in favor of said Franklina for one undivided half of said premises.

The defendants also moved the court to charge the jury as follows, to wit: that this being a joint action, brought by the two plaintiffs jointly, there must be a joint recovery, if any, and that the plaintiff, Matilda C. Gray, not being entitled to recover, it was the duty of the jury to find a general verdict for the defendants. To which charge the plaintiffs objected, and thereupon the court refused to give said charge, to which ruling the defendants excepted at the time.

And the defendants pray that this their bill of exceptions may be signed, sealed and enrolled, which is done.

M. HALL McALLISTER, [SEAL.]
Circuit Court Judge.
OGDEN HOFFMAN, [SEAL.]
District Judge, holding circuit court.

Endorsed: Circuit court U. S. districts of California,
325 northern district. Matilda C. Gray *et al.* *vs.* Santiago Brignardello *et al.* Bill of exceptions.

Filed January 15th, 1862.

CUTLER McALLISTER, *D. C.*

326 UNITED STATES OF AMERICA, *ss:*

Greeting: to Franklina C. Gray, suing by Francis S. Spring, her next friend.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first day of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the districts of California, wherein Santiago Brignardello, James Lee, ——— Browning, ——— Fink, Sin Sin, Edward Moran, N. Groenwald, D. Rand, John Doe, Rafael Reil, Louisa Seveld, Henry Arnock and Richard Roe, are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the honorable Ogden Hoffman, one of the judges of said circuit court this 15th day of January, A. D. 1862.

OGDEN HOFFMAN,
District Judge.

Endorsed:

327 *Citation.*

Service of the within citation on Franklina C. Gray and on Franklin S. Spring is this day admitted at San Francisco, January 16th, 1862.

HALL McALLISTER,
Attorney for said F. C. Gray and F. S. Spring.

Filed January 23rd, 1862.

HENRY C. HYDE, *Clerk.*

328 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the districts of California, in and for the northern district of said State, greeting:

Because, in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you, between Matilda C. Gray and Franklina C. Gray, by Francis S. Spring, her next friend, plaintiffs, and Santiago Brignardello, James Lee, ——— Browning, ——— Fink, Sin Sin, Edward Moran, A. Groenwald, D. Rand, John Doe, Rafael Reil, Louisa Seveld, Henry Arnock, and Richard Roe, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, and it being fit that the error, if any there
329 hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the

United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held. that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein what of right and according to the law and custom of the United States should be done.

Witness, the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this fifteenth (15th) day
330 of January, A. D. 1862.

HENRY C. HYDE,
[SEAL.] *Clerk cir. ct. U. S. dists. of California.*
By CUTLER McALLISTER, *D. C.*

331 The within suit of error allowed.

Supreme Court of the United States.

Santiago Brignardello, *et al.* plaintiffs in error,
vs.
Franklina C. Gray *et al.*, &c.

Writ of error allowed :

M. HALL McALLISTER,
Circuit court Judge.

332 Office of the Clerk of the Circuit Court of the United States for the Districts of California.

I, Henry C. Hyde, clerk of the circuit court of the United States for the districts of California, do hereby certify that the foregoing 327 pages, from 1 to 327, both inclusive, contain a full, true, and correct copy of the proceedings and record in the above entitled cause.

In witness whereof, I have hereunto set my hand and the seal of said court this eleventh day of February, A. D. one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-sixth.

HENRY C. HYDE, *Clerk.*
[SEAL.] By CUTLER McALLISTER, *D'y.*

333 *To the honorable the judges of the Supreme Court of the United States:*

The petition of Matilda C. Gray respectfully shows that judgment has been rendered against her in a certain plea in the circuit court of the United States for the districts of California, sitting in and for the northern district, between the said Matilda C. Gray and Franklina C. Gray, by Francis S. Spring, her next friend, plaintiffs, and Santiago Brignardello, and certain other defendants, and that the said Matilda C. Gray is prejudiced by said judgment, and desires to sue out a writ of error thereon to your honorable court.

Your petitioner further shews that in said plea judgment was rendered in favor of the plaintiff, Franklina C. Gray, suing by Francis S. Spring, her next friend, and that said plaintiff, Franklina C. Gray, refuses to join in said writ of error.

Wherefore your petitioner prays that a summons issue, directed to said Franklina C. Gray, and to said Francis S. Spring, her next friend, to appear and elect whether they will join in said writ of error, or be severed therefrom.

MATILDA C. GRAY.
By P. G. GILPIN,
Her att'y in fact.

SAN FRANCISCO, *May* 26, 1862.

To the honorable the judges of the Supreme Court of the United States:

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

In answer to the foregoing petition appears Franklina C.
334 Gray, by Francis S. Spring, her next friend, and waiving all
service of summons, herein declares that she refuses to join in said writ of error, and prays your honorable court that she be severed therefrom.

FRANKLINA C. GRAY,
By FRANCIS S. SPRING,
Her next friend.

Sworn and subscribed before me, this 16 day of May, 1862.
HENRY C. HYDE, *Clerk.*

Endorsed:

SUPREME COURT.

GRAY
vs.
BRIGNARDELLO.

Petition for writ of error and answer.

Filed June 16, 1861.
HENRY C. HYDE, *Clerk.*

UNITED STATES OF AMERICA, *ss*.

Greeting: To Santiago Brignardello, James Lee, ——— Browning, ——— Fink, Sin Sin, Edward Moran, A. Groenwald, D. Rand, John Doe, Rafael Reil, Louisa Seveld, Henry Arnock, and Rich'd Roe:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the dis-
tricts of California, wherein Matilda C. Gray is plaintiff in
335 error, and you are defendants in error, to shew cause, if any

there be, why the judgment in the said court of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Ogden Hoffman, one of the judges of the said circuit court, this 27th day of June, A. D. 1862.

OGDEN HOFFMAN, *Dist. Judge.*

Endorsed: Circuit court of the United States for the districts of California, northern district. Matilda C. Gray, pl'ff in er., *vs.* Sant'go Brignardello *et al.*, def'ts in error.

Citation.

Due service and a duly certified copy of the within citation is hereby admitted this 10th day of July, 1862.

CROCKETT & CRITTENDEN,
Atty's for Def'ts in error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the districts of California, in and for the northern district of said State, greeting:

336 Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you, between Matilda C. Gray and Franklina C. Gray, by Francis S. Spring, her next friend, plaintiff, and Santiago Brignardello, James Lee, ——— Browning, ——— Fink, Sin Sin, Edward Moran, A. Groenwald, D. Rand, John Doe, Rafael Reil, Louisa Seveld, Henry Arnock, and Richard Roe, defendants, a manifest error hath happened, to the great damage of the said plaintiff, Matilda C. Gray, as by her complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this twenty-seventh day of June, in the year of our Lord one thousand eight hundred and sixty 337 two, and of the independence of the United States the eighty-sixth.

HENRY C. HYDE,
Clerk Cir. Ct. U. S., Dist. of California.

[SEAL.]

Allowed.

OGDEN HOFFMAN, *Dist. Judge.*

In the circuit court of the United States for the districts of California, northern district.

Matilda C. Gray and Franklina C. Gray, by Francis S. Spring, her next friend,
vs.
Santiago Brignardello *et als.*
} At common law.

Office of the Clerk of the Circuit Court of the United States for the Districts of California.

I, Henry C. Hyde, clerk of the circuit court of the United States for the district of California, do hereby certify that the foregoing 324 pages, from 1 to 324, both inclusive, contain a full, true, and correct copy of the proceedings and record in the above-entitled cause.

In witness whereof, I have hereunto set my hand and the seal of said court this eleventh day of July, A. D. one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

HENRY C. HYDE,
Clerk U. S. C. C.

[SEAL.]

Filed Nov. 17, 1862.

No 169

1019

SUPREME COURT,

OF THE UNITED STATES.

SANTIAGO BRIGNARDELLO, *et al.*
Plaintiffs in Error,

against

FRANKLINA C. GRAY,
Defendant in Error.

BRIEF FOR DEFENDANT.

PHILIP G. GALPIN,
Of Counsel.

New-York:
BLOOM & SMITH, LAW PRINTERS, 73 FULTON STREET, N. Y.
1862.

1021

SUPREME COURT,

OF THE UNITED STATES.

Santiago Brignardello, *et. al.*,
Plaintiffs in Error.

vs.

Franklina C. Gray,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

FACTS AND PLEADINGS.

This is an action of ejectment, brought in the Circuit Court of the United States, for the Districts of California, to recover possession of a lot in the City of San Francisco.

Both Plaintiffs and Defendants claim title under Franklin C. Gray, deceased.

TITLE OF DEFENDANT IN ERROR.

Franklin C. Gray died July 15th, 1853, and left him surviving a widow, Matilda C. Gray, and also a posthumous child, Franklina C. Gray, who is the Defendant in Error here. He also left an estate, real and personal, inventoried in the Probate Court of San Francisco, at over $230,000. Record p 2

The lot in controversy was a portion of this realty and was deeded to *Franklin C. Gray alone.* By a statute of California, the widow and child took the premises in equal moieties. (Compiled Laws of Cal. p. 186 § 1) We claim that by force of the Statute, they took the precise estate, which by the common law of England was cast upon heirs female. They, in effect, became *co-parceners.* ib Chap XLI,

The existence in California of the estate of co-parcenary is recognized by Statute.

Stat. Cal., 1857, p. 62.

PLEADINGS.

THE DECLARATION.

Stat Cal 1857 p62
Teese v Phelps
1 McAllister 18

As such co-parceners, and by virtue of the Statute of California, ~~(Comp. Laws Cal. p. §~~), and in accordance with the Rules and practice of the Circuit Court, in the districts of California, the widow and child joined in bringing this action of ejectment. The declaration alleges the seizing of the premises in controversy by Franklin C. Gray, his death, and the relationship to him of each plaintiff.

These allegations were proven.

THE PLEA.

The defendants below plead title as innocent bona fide purchasers, under a decree, sale and deed, made by and under the authority of the District Court, for the Fourth Judicial District of the State of California. To the action or actions in which the above decree was rendered, the plaintiffs below are alleged to have been parties.

THE REPLICATION.

To this Plea the plaintiffs below replied:

1st. *Nul tiel record*, for that they were not served with a summons in said action.

2d. That the decree, sale and deed in said Plea mentioned, were obtained by fraud patent on the Record.

3d. That said decree, sale and deed were each insufficient in law to pass the plaintiffs title.

By the instruction of the Court a verdict was rendered against the plaintiff, Matilda C. Gray, but in favor of the plaintiff, Franklina C. Gray, for an undivided moiety of the premises. Such verdict and judgment is expressly authorized by a Statute of California, (Laws Cal.), and is in accordance with the rules and practice of the Circuit Court.

Record p 142
Comp Laws. 544

From the judgment entered upon this verdict, two Writs of Error were sued out; one by the plaintiff, Matilda C. Gray, and one by the defendants below, against the plaintiff, Franklina C. Gray.

The latter is the one now before the Court. In both cases, however, the whole controversy turns upon the effect on the title of the heirs of Gray of the decree, sale and deed, by and under the authority of the State Court.

TITLE OF PLAINTIFES IN ERROR.

On the eighteenth of February, 1854, William H. Gray, a brother of the deceased, and a resident of California, filed his bill in the District Court of that State, against Joseph C. Palmer and Cornelius J. Eaton, the administrators of the estate of Franklin C. Gray, deceased, and also against his widow and child. These heirs then were and now are residents of the State of

New York. Service of the summons upon them by publication was attempted.

In this bill William H. Gray alleged that for many years, then past, a partnership had existed between himself and the said Franklin C. Gray. That this partnership was carried on in the name of Franklin C. Gray alone, and was limited to no particular *time*, *business* or *property*. That it embraced all affairs and all posessions even to the realty which stood in the sole name of the decendant. Record p 8

This alleged partnership was both *universal* and *dormant*.

The scope of the bill was to settle up the business of this partnership. It's prayer was "that one-third of the said estate be adjudged and decreed to belong to said William H. Gray, under the said partnership agreement, and that partition be made thereof between himself and the defendants." *No sale was prayed for.*

Record p 20

On the fifth of January, 1855, special issues were sent to a Jury for trial. They found for the plaintiff. On that verdict no decree was then entered.

Soon after in April, 1855, Cornelius J. Eaton, a clerk of the decedent, who as administrator had been joined as defendant in the foregoing action, resigned his trust, and filed his bill against the remaining administrator, Palmer, and also against the widow and child. *He did not join William H. Gray as a defendant.* By a suggestive coincidence, Eaton alleged the existence between himself and the decedent of a universal and dormant partnership, similar to that already set forth by William H. Gray. The scope of this bill also was to settle the business of this partnership: it's prayer was for "a *partition and sale* of the entire estate, and that one fourth of the same be adjudged and decreed to him, (Eaton,) under his partnership agreement."

Record 124

When, as was supposed, a sufficient publication of each summons had been made, on petition of each plaintiff, the same person was appointed guardian ad litem, for the child in each action. This guardian also appeared as attorney for the widow.

On the 23d day of October, 1855, upon a stipulation signed by this guardian and the respective attorneys, an order was entered for the consolidation of these two actions. Record 39

Four days after, *one* decree was entered in this so-consolidated action. This decree, entered without a trial, (see record p 55) determined that said dormant and universal partnership had existed between Eaton and the decedent; that a similar one had co-existed between William H. Gray and the decedent; that Eaton should first take his one-fourth of the estate, William H. Gray one-third of the remaining three-fourths, leaving two-fourths to be equally divided between the widow and the child. The decree also ordered a reference to state partnership accounts—a sale of the entire estate and a division of the proceeds. As F. C. Gray, during his lifetime, had spent the money of the alleged firm, *as freely as though it had been his own*, and as it had not occurred to these alleged partners, during that time, to draw out any monies at all, it naturally turned out, on a statement of these back accounts, that the decedent was largely indebted to each of these alleged partners. The entire estate was sold at auction, and the shares, which according to the decree belonged to William H. Gray and Eaton, were paid over to them; but the indebtedness of the decedent to each of his alleged partners was so great that it entirely swept away the portion of the widow and the child. Out of an estate inventoried at over $230,000, (record p.) their only inheritance turned out to be a debt due by the Estate to William H. Gray of $3533 $\frac{17}{100}$, for which the record shows he had judgment. Record Page. 89-105

Upon a sale had under this decree, the defendants below purchased the premises in controversy.

After this sale another attorney was employed by the widow—an appeal was taken, and the said decree was reversed by the Supreme Court of California. They determined that *no partnership between William H. Gray and the decedent had ever existed*, and that the summons in the action of Eaton vs. Palmer, et al, had never been served upon this defendant in error. (record p. 107-8) The cause was remanded, and in the lower court both bills were dismissed. Record 117-

The plaintiffs below then brought this action of ejectment for the land, and on the trial established their prima facie case. The defendants below offered the judgment roll and proceedings had in the Fourth District Court of the State of California, in the consolidated action of Gray vs. Eaton, et al, and Eaton vs. Palmer, et al. To the introduction of this record, it was objected that it did not show jurisdiction obtained over the infant. Upon the issue of nul tiel record thus joined, the court found for the defendant in error. No evidence of title other than that dependant upon said judgment roll being offered, the defendant in error had a judgment, but by order of the court a verdict was rendered against the plaintiff, Matilda C. Gray,—judgment in this form is authorised by the statute of the State, and the rules and practice of the Circuit Court Comp. Laws Cal. p 544 § 145-146. Teese vs Phelps 1 McAllister 18, Circuit Ct Rules Record p. 133

BRIEF.

I.

The issue of *nul tiel record* is an issue of fact, and although determined by the Court, and not by the Jury, that determination can not be reviewed by the Supreme Court. Judiciary Act 1789
U States vs Cook 2 Mason 22

The service of the summons on the infant was to be effected by the performance of various acts prescribed by Statute. If any essential act so prescribed was omitted, the decision of the Court below was correct. To reverse that decision for error on this point, the Supreme Court must decide that every act required was done. It must then review and reverse the finding of the Court below upon these various matters of fact. "A " determination upon the issue of a plea of nul tiel " record can not be reviewed by the Supreme Court."

2 Mason 22

II.

It is the law of the case that in ***Eaton vs. Palmer**, et. al.* the State Court acquired no jurisdiction over this defendant in error. Record p. 110 but unless jurisdiction was had in each action order of Sale was void.

In *Gray vs. Eaton, et. al.*, no service was obtained because of various defects.

THE SUMMONS.

1. *No summons was issued.*

There are two papers in the judgment roll, offered in evidence, each of which purports to be a summons.

In the first, Franklina C. Gray is not mentioned. See Record, page 23. Summons dated Feby 14th

The second is neither *under seal* nor *subscribed* by the Clerk. In the original judgment roll it is simply a printed paper. See Record, page 24. Dated July 5th

It was said below, this only *purported* to be a copy of an original summons. How do we know an original was ever issued? How do we know this is a true copy? The judgment roll below ought to have contained the original summons. It did not.

Again: If, as we were told below, the Court must assume it to be a copy, then a *true* copy. If so, the original was not under seal, and was a nullity. Neither (L. S.) nor (seal) are on the copy, nor is any blank left for the seal. Record p 24

As to absolute necessity for seal, see Practice, Act of Cal., § 23. Comp Laws 522, 523 and

Compiled Laws of Cal., Tit., Courts of Justice, page 756 § 103.

2. The Practice Act provides that the Summons shall specify the County where the complaint is filed. This is not done. Practice Act of Cal., § 24. Comp Laws 523
Record, page 7.

Otherwise the non-resident is not informed where in the district he is to appear.

It is said this defect is purely in a matter of form.

But if the prescribed forms can safely be disregarded, a simple advertisement published in a newspaper conveying the required information is as valid as the publication of the summons itself.

The Court has no Legislative power to say this or that provision of the Statute may safely be disregarded. Where the service is purely technical and nominal, we have a right to insist that every technicality be complied with. Kendall *vs.* Washburn, 14 How. Pr. 381.

Titus *vs.* Releya, 16 How. Pr. 376.

3. The Practice Act of California does not provide for an alias summons in Courts of record.

If it did, this second paper is not an alias. It is a new writ throughout. Practice Act Cal. § 23.

Comp Laws § 22, § 23 § 22

4. The Clerk has no power to *amend* the action by joining a new defendant. It could
of the Court, and that order by
the judgment roll, Practice Act

There was no such order made, an
gally a party to this action.

Titus *vs.* Releyea, 16 How. Pr. R. 376.

II. *No summons was served.*

The Record must not only show that a valid original writ, under the seal of the Court, subscribed by the Clerk, and legally containing the name of the defendant in error was issued, but it must shew that such writ was served.

The judgment roll alone can furnish such evidence.

1 Blatchf, Ct. Ct. 480. - 487

Smith *vs.* Towle 12, Wend 11.

The Statute of California prescribes the mode in which alone service can be proven. It is *not* by the *parol testimony*, *but* by the *affidavit* of the *printer*, *foreman* or *principal clerk* of the newspaper establishment which prints the summons.

Practice, Act of Cal. § 30, 31 and 33.

1. The affidavit does not shew that the affiant was either printer, foreman or principal clerk.

See Record, page 24

The affidavit *describes* the affiant as *being* the principal clerk, but there is no proof that he was such.

Such description is not a compliance with the Statute

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If it did, this second paper is not an alias. It is a new writ throughout. Practice Act Cal. § 23.

Comp Laws 522, §23 §22

4. The Clerk has no power to *amend* the action by joining a new defendant. It could only be done by order of the Court, and that order by Statute forms a part of the judgment roll, Practice Act Cal. § 203. Comp Laws 555 §203 pt 2

There was no such order made, and the infant was not legally a party to this action.

Titus *vs.* Releyea, 16 How. Pr. R. 376.

II. *No summons was served.*

The Record must not only show that a valid original writ, under the seal of the Court, subscribed by the Clerk, and legally containing the name of the defendant in error was issued, but it must shew that such writ was served.

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See Record, page 24

The affidavit *describes* the affiant as *being* the principal clerk, but there is no proof that he was such.

Such description is not a compliance with the Statute

The authorities are decisive upon this point.

McMillan *vs.* Reynolds, 11 Cal. 377-8
Lindsey *vs.* Sherman, 5 How. Pr. 308.
Payne *vs.* Young, 4 Sheldon, R. 158-9.
Exparte Shumway, 4 Denio, 259.
Exparte Bank of Munroe, 7 Hill, 178.
Staples *vs.* Fairchild, 3 Comstock, 43.
Cuningham *vs.* Godet, 4 Denio, 71.
Noyes vs Buller 6 Barb 613

2. The publication was not for three months as required by Statute. (Record, page 242)

Practice, Act of Cal. Sec. 31. Comp Laws 524

Section 530 of Practice, Act of Cal. applies to the
o/ computatian of time. Comp Laws 613

Calendar and not lunar months are meant.

McMillan *vs.* Richards, 9 Cal. 374, 405, 420.

3. *The affidavit of Wistar does not shew which summons was deposited in the Post Office.* Record p 25

If the *first*, the infant was not mentioned in and was no party to it. 3 How Pr 416 417

4. The Statute directs that the summons and complaint be deposited "forthwith" in the Post Office.

The copy of the alleged order to publish, deposit &c., is dated June 28th, 1854. Summons and complaint were deposited in the Post Office July 13th, 1854.
Record 24. 25.

"Forthwith" means "not a reasonable time in view of all circumstances, but a reasonable time to accomplish the act to be done when all of one's time is devoted to it."

Littlefield *vs.* Munn, 4 How. Pr. 306.
Harmon *vs.* Glover, 10 Wend. 617.
Sabin *vs.* Johnson, 7 Cowen, 421.
3 Chitty, General Practice, 112.
Timpson *vs.* Henderson, 1 Mood and Malk 300, (22 bbb. 313).

We are not to shew that fifteen days is not a reasonable time in which to copy the complaint, and carry it to the Post Office, as was argued below, but the Court is to say whether from all that appears on the face of the record, fifteen days was a reasonable time to do those acts.

That "forthwith" means less than fifteen days.

See Back *vs.* Cresswell, 2 Abbott, Pr. 386-7.

5. One summons and complaint should have been served upon the *infant* and *another* upon the guardian.

Practice, Act of Cal § 29. Opinion Sup. Ct. Cal Record 110

6. It is not pretended that the guardian was served in *any* manner.

7. There is no provision whatever in the Statutes of California for serving a summons upon a non-resident, *minor*. Practice, Act of Cal. § 29 and 30.

Comp. Laws 523. 524

The summons not having been served, the Court had no authority over the infant, or power to appoint a guardian for her. Gray *vs.* Eaton 9 Cal. 616-638

Record page 110

To this array of defects and omissious but two answers have been heretofore urged.

First. "These defects make the judgment voidable, not void. The service was perhaps defective, but still a service was had."

Secondly. "The State Courts have passed upon the regularity of the process, the sufficiency of the affidavits, and the proof of publication."

To the first answer, we replied—

1/ There is no such thing as three-fourths or nine-tenths of a service. We insist that while a defective service or no service might be cured by an appearance,—if there be no appearance, a defective service is no service at all.

How could the judgment be voidable only, when there is no person authorized to avoid? "Voidable implies there is some party in Court who may avoid."

Woodcock *vs*. Bennet, 1 Cowen, 739.

To the second answer we replied:

No *decree* or *judgment* of either the Fourth District or he Supreme Court *recites any finding whatever* as to the *ufficiency* of the service, nor *any finding* as to the existnce of *any single fact essential to such service.* Nor does he opinion of the Supreme Court state any such propsition. (See record, page~~s~~ 51).

01

But if the opinion of the Supreme Court of California did state any such proposition, it would not debar this Court from examining into the record to see whether we had had our day in court or not, and "when the court looks into the record to see if another tribunal had jurisdiction, everything is open to inspection, from process to judgment, inclusive, and each and every defect in acquiring jurisdiction which might have been taken advantage of on appeal, may be taken advantage of collaterally, for the very theory of the principle is that a party ought not to be divested of his right who has had no day in court."

Fisk v. Anderson, 33 Barb. 74.

This Court has said in Thatcher vs. Powell, 6, Wheat 127.

"Where a court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction ought to appear in order to show that its proceedings are coram judice."

m—

There were two technical objections taken in the court below which we scarcely suppose will be pressed here:

First. "The infant plaintiff appeared by her next friend instead of by her guardian, as provided by the statutes regulating the practice in the State Courts."

It is true that by its rules, and for the convenience of Attorneys, the Circuit Court in the Districts of California has adopted generally the practice of the State Courts, but in so doing it has not deprived itself of any of its inherent common law prerogatives, nor closed its doors to any suitor who appears in the manner always known to the Common Law.

So in this case it has decided; and this court, we conceive, will scarcely interfere with the lower court in the exercise of its judgment upon the force and effect of its own rulers.

The second objection was to the joinder of the plaintiffs, and the severance in the judgment—

By the Statutes of California, co-parceners, joint-tenants and tenants in common, may *now* join or sever in an action relating to the realty (Practice, Act Cal. Comp Laws Cal). This practice has been adopted in the Circuit Court. Stat Cal 1857 p 62 Record 132-134

waived by not demurring

But even at common law: Tenants in common had a right to join "in actions of tresspass relating to the possession." IV. Kents Com. p. 368.

As to the *severance* in the jndgment: This also is expressly provided for by the statutes of California, and has been adopted into the practice of the Circuit. (Comp Laws Cal). Record 133-134. Comp Laws 544

A similar statute has been enacted in New York and some other of the States.

If erroneous, Matilda C. Gray should have recovered below (See Brief in No 223) and if on this ground this judgment be reversed, the lower Court should be directed to enter judgment in favor of M.C. Gray and therefore in favor of both Plaintiffs —

In those special cases in which this Court can review the decision of the New York Court of Appeals, its powers are as untramelled as in reviewing the judgment of the Circuit Courts. Would this Court reverse on writ of error a judgment of the Court of Appeals upon the ground that the judgment of that court was irregular, for that it was in favor of one plaintiff and against another.?

The objection is purely formal and in regard to a matter of practice. 3 Peters 445

We insist that as this is an action to test the "title to real estate," the "forms of proceeding," authorised by the legislature of the State, and adopted into the practice of the Circuit Court by its Rule~~r~~s are to be followed. Judiciary Act 1789

New York, December 1st, 1862. All which is respectfully submitted.

PHILIP G. GALPIN.

Of Counsel.

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In the Supreme Court
OF THE UNITED STATES.

SANTIAGO BRIGNARDELLO
ET AL~~S~~., PLAINTIFF IN ERROR,

VS.

MATILDA C. GRAY
ET ALS., DEFENDANT IN ERROR.

Brief for Appellants.

J. B. CROCKETT,
Of Counsel for Appellants.

Towne & Bacon, Printers.

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IN THE SUPREME COURT
OF THE UNITED STATES.

SANTIAGO BRIGNARDELLO et als.,
PLAINTIFF IN ERROR,

vs.

MATILDA C. GRAY et al.,
DEFENDANT IN ERROR.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This is an action of ejectment brought by the defendants in error against the plaintiffs in error, to recover a lot in the city of San Francisco. The plaintiff Matilda is the widow, and the other plaintiff, the infant and only child of Franklin C. Gray, deceased, who died intestate. On the trial, the following facts were established in evidence:

1st. That the said Franklin C. Gray, deceased, at the time of his death held the legal title to the premises in the controversy.

2d. That after his death, letters of administration on his estate were granted in San Francisco to Palmer & Eaton, who duly qualified.

3d. That after the administrators qualified, a suit in chancery was commenced in one of the State Courts, at San Francisco, by one William H. Gray against the administrators and against the widow and infant child of F. C. Gray (the defendants in error) in which suit the said William H. Gray claimed that he and the said F. C. Gray were general partners in all their property and business operations in California, and that he was interested as a partner in all the property and estate which F. C. Gray owned in California at the time of his death. He prayed for a decree establishing the partnership and for a settlement of the partnership accounts and a division of the partnership property. The administrators and the widow filed their answers, contesting the partnership and denying the equity of the bill. The infant child was brought into Court, by a publication against it, as an absent defendant, under the statutes of California, and a guardian *at litem* was appointed to represent the infant, who filed an answer for his ward.

Whilst this suit was pending, Eaton, one of the administrators, also brought a suit in chancery against the other administrator and against the widow and child claiming that he also was a partner with F. C. Gray, deceased, in his California business and property; but not as a member of the same partnership set up by Wm. H. Gray. He also prayed for a settlement of the partnership accounts and for a distribution of the partnership property. The widow and administrator appeared and answered, and Eaton attempted to bring in the infant by publication; but his proceedings to that end were afterwards decided by the Supreme Court of California to be defective as will hereafter appear. These two suits were pending in the same Court, and were ordered to be consolidated and tried together. At the trial, special issues were framed and submitted to a jury, which found all the material issues in favor of the plain-

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tiffs Gray and Eaton. On this finding, an interlocutory decree was rendered in accordance with the finding, and referring the matter to a master to ascertain and report a list of the partnership property, and to state the partnership accounts. On the coming in of the report, a final decree was rendered ordering a sale of the property and a distribution of the proceeds. At the sale made by the master under this decree, the premises in controversy were sold to the plaintiff in error, Brignardello, who paid a large sum therefor, took a deed from the master and entered into possession.

Some months after the sale, the widow and infant child took an appeal to the Supreme Court of California, and on the trial of the appeal, the cause was reversed as to the infant, on the ground that in the case of Eaton the publication was defective and the infant was not before the Court; and in the case of Wm. H. Gray, it was reversed as to all the defendants on the ground that the proof was not sufficient to establish the partnership. The case is reported in the 9th Cal. R. 616.

4th. It was proved on the trial, that at the master's sale, the plaintiff in error, Brignardello, paid a full, fair price for the property; that the sale was largely attended and fairly conducted, and that the master's report of the sale was confirmed and approved by the Court.

On the trial of this action in the Circuit Court, the plaintiffs insisted that the infant defendant was not properly brought before the Court in the case of Wm. H. Gray, and that the publication against the infant was irregular and void; and that therefore the infant was not bound by the decree. For the defendants, it was claimed, 1st, That the publication was regular and valid; and, 2d, That the Supreme Court of California, on the appeal, expressly adjudicated that point and that it is *res adjudicata.*

Under the instruction of the Court, the jury found a verdict in favor of the infant plaintiff, for one-half the property and for the defendants as to the other half. Judgment was entered accordingly, and the parties have sued out cross-writs of error.

ARGUMENT.

I.

The publication against the infant in the case of Wm. H. Gray was regular and valid, and in substantial compliance with the statutes of California. The 9th and 10th sections of the Practice Act are as follows:

"9. When an infant is a party he shall appear by "guardian who may be appointed by the Court in which "the action is prosecuted, or by a Judge thereof, or a County Judge.

"The guardian shall be appointed as follows: 1st, "When the infant is plaintiff, upon the application of "the infant, if he be of the age of fourteen years; or if "under that age, upon the application of a relative or "friend of the infant. 2d. When the infant is defendant, upon the application of the infant, if he be of the "age of fourteen years and apply within ten days after "the service of the summons; if he be under the age "of fourteen or neglect so to apply, then upon the application of any other party to the action, or of a relative "or friend of the infant."

The 30th, 31st, and 33d sections prescribe how service is to be made by publication. These sections are as follows:

"30. When the person on whom the service is to be made resides out of the State, or has departed from the State; or cannot after due diligence, be found within the State; or conceals himself to avoid the service of summons, and the fact shall appear by affidavit to the satisfaction of the Court, or a Judge thereof, or a County Judge, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such Court or Judge may grant an order that the service be made by the publication of the summons.

"31. The order shall direct the publication to be made in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week: *Provided,* That publication against a defendant residing out of the State, or absent therefrom, shall not be less than three months. In case of publication where the residence of a non-resident or absent defendant is known, the Court or Judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the State, shall be equivalent to publication and deposit in the post-office. In either case the service of the summons shall be deemed complete at the expiration of the time prescribed by the order of publication. In actions upon contracts for the direct payment of money, the Court in its discretion may, instead of ordering publication, or may, after publication, appoint an attorney to appear for the non-resident, absent, or concealed defendant, and conduct the proceedings on his part."

"33. Proof of the service of the summons shall be as follows:

1st. If served by the Sheriff or his deputy, the affidavit or certificate of such Sheriff or deputy; or,

2d. If any other person, his affidavit thereof; or,

3d. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same; and an affidavit of the deposit of a copy of the summons in the post-office, if the same shall have been deposited; or,

4th. The written admission of the defendant."

The 22d, 23d, 24th, and 25th sections prescribe how actions are to be commenced, and are as follows:

"22. Civil actions in the District Courts, Superior Court of the City of San Francisco, and the County Courts, shall be commenced by the filing of a complaint with the Clerk of the Court in which the action is brought, and the issuance of a summons thereon.

"23. The Clerk shall endorse on the complaint the day, month, and year the same is filed; and at any time after the filing, the plaintiff may have a summons issued. The summons shall be signed by the Clerk and directed to the defendant, and be issued under the seal of the Court.

"24. The summons shall state the parties to the action, the Court in which it is brought, the county in which the complaint is filed, and require the defendant to appear and answer the complaint, within the time mentioned in the next section, after the service of summons exclusive of the day of service, or that judgment by default will be taken against him according to the prayer of the complaint, briefly stating the sum or other relief demanded in the complaint.

"25. The time in which the summons shall require the defendant to answer the complaint, shall be as follows:

1st. If the defendant is served within the county in which the action is brought, ten days.

2d. If the defendant is served out of the county, but in the district in which the action is brought, twenty days.

3d. In all other cases, forty days."

The validity of the service by publication must be decided under these sections.

The original complaint was filed on the 15th February, 1854; but at that time the infant defendant was not born, being a posthumous child. On the 27th June, 1854, an amended complaint was filed, setting forth the birth of the infant, and making it a defendant. On the following day, on motion of the plaintiff, (Gray) an order was made by the Court, directing a publication against the infant, once a week for three months, in the *Times and Transcript*, a paper published in San Francisco, and that a copy of the complaint and summons be forthwith deposited in the Post Office at San Francisco, directed to —— Gray, infant daughter of Franklin C. Gray, deceased, to the care of Matilda C. Gray, her mother, Brooklyn, New York.

On the 13th July, 1854, an affidavit of J. J. Wistar was filed, to the effect that he had on that day deposited in the Post Office a certified copy of the complaint and summons, addressed as required by the order.

On the 21st November, 1854, an affidavit of L. Humphreys was filed, in which he is described as clerk in the office of the *Times and Transcript*, and he makes oath that the notice was published at least once a week for three months, commencing on the 13th July, and ending on the 12th October, 1854. On the 16th day of December, H. S. Foote, by an order of the Court, was appointed guardian *ad litem* for the infant, and on the 2d January, 1856, he filed an answer for the infant.

On the day of filing the original complaint, a summons was issued against the administrators, and they filed their answer on the 30th March, 1854. The answer of the widow was filed on the 9th October, 1854.

Annexed to the affidavit of the printer (Humphreys) was a copy of the summons, which was published; but the original was lost and could not be found. The original summons against the administrators, by a clerical error, bears date one day before the filing of the complaint; but recites the fact that the complaint was filed, and the proof shows it was a mere clerical error.

On these facts, the service by publication was objected to on the following grounds:

1. That the notice was not published for three months; that commencing on 13th July and ending on 12th Oct., it lacked one day of three months.
2. That the affidavit of the clerk as to the publication, does not state that he was "principal" clerk; but only the clerk.
3. That the affidavit only recites the fact that he was clerk, and he does not make oath to that fact.
4. That a deposit of the copies of the complaint and summons in the Post Office on the 13th July, was too late; that they ought to have been deposited "forthwith," as required by the order.
5. That the suit was not commenced and there was

no action pending, when the order of publication was made; because the original summons against the administrators was issued before the complaint was filed, and no summons was issued against the infant until after the order of publication was made.

6. That the summons does not describe the county in which the complaint was filed.

We propose to notice these objections in their order:

1. Was the notice published three months? The affidavit states that the first publication was made July 13th, and the last, October 12th. This was precisely three months. If it had been again published on the 13th October, it would have been one day over three months. The day of the first publication must be included in the computation. The following authorities are deemed conclusive on this point, if any were needed on so plain a proposition:

Griffith v. Bogart, 18 How., 158.
State v. Schmirle, 5 Rich., C. L. Rep., 299.
Manning v. Doe, 10 Ib., 395.
13 B. Monroe, 461.
9 Cranch., 104.
4 Wash. C. C. R. 232.
4 Pet. R., 349.

But the affidavit states explicitly that the notice was published for three months, and then proceeds to give the dates of the first and last publications. The latter statement is surplusage and must be disregarded, if in conflict with the former.

Swayze v. Doe, 13 Smedes & M., 317.

2. The omission of the word "principal," before the word "clerk," in the affidavit of Humphreys, is immaterial. It was so expressly decided by the Supreme Court of California, in this case, and in adjudicating this particular affidavit.

Gray v. Palmer, 9 Cal. R., 616.

3. In the affidavit, Humphreys is described as clerk; but, it is said, this is said only by way of recital, and that it is not one of the *facts* to which he deposes. At

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the trial in the Circuit Court, several New York cases were cited on this point; but the reasoning is so unsatisfactory as to destroy their weight as authority. No one can read the affidavit and avoid the conclusion, that Humphreys intended to swear that he was clerk in that office. If he was not clerk when he made the affidavit, he could undoubtedly have been convicted of perjury, as it is evident on the face of the affidavit, that he intended to depose, and did depose to that fact. When he signed that affidavit and swore to it, he affirmed the truth of every fact that it contains, and one of these facts, is that he was a clerk in the office of that newspaper.

But to obviate any difficulty on this point, Humphreys was called as a witness on the trial, and was offered to prove the fact, that at the date of the affidavit, he was the principal clerk in the office. If his affidavit was defective, (which is not admitted) it was competent to establish the necessary facts on the trial.

If a sheriff's return on a summons be insufficient, or if he fail to make any return, an innocent purchaser at a judicial sale, should not lose his property because of the laches of the officer, provided the defendant was in fact duly served. The fact of service may be shown at any time, in order to uphold the jurisdiction of the court. It is the fact of a proper service, and not the return of the officer, which confers jurisdiction. The return, if properly made, is evidence of the fact; but not the only evidence. If from negligence, accident, or fraud, the officer fails to make a proper return of process duly served, the fact of service may be established otherwise, in support of the jurisdiction; and the same rule applies in respect to the printer's affidavit, which is one of a series of acts, to perfect a service by publication. If the notice was in fact duly published, the court does not lose its jurisdiction, simply because the printer has made an insufficient affidavit.

4. The copies of the complaint and summons were deposited in the Post Office within proper time. The

order required them to be "forthwith" deposited and the statute is to the same effect. But the term "forthwith," is a relative term, and may embrace different periods of time, according to circumstances. If an act involving time and labor in its performance, is to be done "forthwith," it is not to be understood that it must be instantly done, but only that it shall be done as quickly as circumstances will permit. If one undertakes to construct a steamboat "forthwith," he agrees to do it without unnecessary delay. The delay must always be proportioned to the work to be done. The term, in its legal sense, only means that it must be done as quickly as the circumstances will permit. In this case, the copies could not be deposited until the Clerk had made and certified them. It may be that his other duties did not permit him to make them for some days, or the Clerk may have been disabled by sickness, or other unavoidable causes may have delayed the deposit for a few days.

But the obvious answer to this objection is, that the Court in which the action was pending, before rendering judgment against the infant, necessarily passed upon the sufficiency of the deposit. It was for that Court to decide, whether or not its order in respect to the deposit had been complied with. For aught that appears, it was proved, to the satisfaction of the Court, that the deposit could not possibly have been made earlier.

It is well settled law that in respect to a jurisdictional fact of this character, the judgment of the Court which tried the case is conclusive and cannot be enquired into in a collateral proceeding. In order to hold the deposit to have been out of time, this Court must decide that, under any and all circumstances, it was insufficient. It cannot so hold, for the obvious reason that it may or may not have been sufficient, according to circumstances, and this Court, in a collateral proceeding, has no power to enquire into the circumstances. But the Court in which the cause was pending, had the power, and, having passed upon the sufficiency of the deposit, its judgment is conclusive until reversed. Whenever the Court in which an action is pending, is required to pass upon the sufficiency or insufficiency of facts to support its jurisdiction, its judgment is conclusive, and cannot be impeached collaterally.

Rusher v. Sherman, 28 Barb., 416.
Irwin v. Scriber, 18 Cal. R., 499.
Varian v. Stevens, 2 Duer's R., 635.

On the trial in the Circuit Court, a case was cited from 2 Abbott's Practice Reports, in which it was held under a similar statute, that a deposit in the Post Office, was not good, because of a few days' delay. But that was a motion in the original cause to relieve a purchaser at a judicial sale, and the Court had the power to pass upon the whole question, and to decide upon its own jurisdiction. It had the power to correct the error, by directing a new publication and thus bring the absent defendant into Court. But no such power exists in a collateral proceeding, and when the Court which passed upon the sufficiency of the publication, decided that the deposit was sufficient, and thereupon rendered judgment against the infant, it will be presumed, in a collateral proceeding, that the necessary proofs were made to satisfy the Court, that the deposit in the Post Office was made as early as was practicable. No one could safely buy, at a judicial sale, against an absent defendant, if the rule were otherwise.

5. When the original complaint was filed, and a summons issued against the administrators, the suit was commenced. Thenceforth it was a pending action. The fact that the summons bears date one day before the complaint was filed, is evidently the result of a clerical error. The proof shows this clearly, and the summons itself recites the fact, that the complaint was filed, and states its contents. The Court, therefore, had jurisdiction of it, as a pending action, so far as to authorize it to make orders for bringing in new parties. But the administrators had *filed an answer* before the order of publication was made against the infant. With what

grace can it be claimed, that there was no action pending, when the complaint and answer had both been filed? The Court, therefore, had complete jurisdiction of the cause, so as to enable it to bring in new parties.

But, it is said, that when the publication against the infant was ordered, no summons had issued against the infant, and that no publication could be ordered until after such summons had issued, because the statute requires the summons to be published, and that this presupposes the existence of a summons, in advance of the order.

The statute only directs that a copy of the summons be published, and it is wholly immaterial whether the summons be issued before or after the order is made. The cause was already pending, and the Court had power to bring new parties before it. To do this, it was necessary to issue a summons, because the summons must be published. But there can be no reason why the order could not be made as well before as after the summons. The object of the proceeding is to give notice to the absent defendant, and it is not material whether a summons has already issued, or is issued afterwards. The purpose of giving notice is accomplished equally well in either case, and as the statute does not require that the summons shall have first issued, it is evident the Court had power to make the order in advance of the summons. But if necessary to support the jurisdiction, it will be presumed, in a collateral proceeding, that a summons issued before the order was made; that a summons issued on the 5th of July is proved by the fact that a copy of it was published.

The statute must receive a reasonable interpretation, looking to the end to be accomplished, to wit: to give notice to the defendant, and it can make no difference in this respect, whether the summons precede or follow the order. For the purpose of making the order, the Court has jurisdiction on filing the complaint and the affidavit of non-residence. It would be wholly useless to issue a summons against a non-resident except for

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publication. The statute amounts but to this:—That the Court being satisfied the defendant is a non-resident, may order the service to be made by publishing the summons, instead of personal service.

6 How. Practice R., 47.

3 Code Reporter, 139–176.

But an error or omission in a matter of form will not affect the jurisdiction. The test is whether the error or omission is of form or substance.

Whitwell v. Barbier, 7 Cal., 62.

It is at most a matter of form, whether the summons issued before or after the order.

6. The summons sufficiently describes the county in which the action was pending. It is entitled, "State of California, County of San Francisco. In the District Court of the Fourth Judicial District of said State," and recites that the complaint is "filed in our said Court." This designates with entire certainty the county in which the suit was pending, and particularly as the Fourth District Court, was by law limited to that county, and had no jurisdiction beyond it.

Cook v. Kelsey, 19 N. Y. (10 Smith) R., 412.

On the whole, the statute in respect to the publication has been complied with substantially, if not literally, in every particular.

II.

The sufficiency of the publication is not an open question, but is *res adjudicata*, and cannot be enquired into in this action. The adjudications of the Supreme Court of California, in the case of Gray v. Palmer, 9 Cal. R., 616, is conclusive upon the plaintiffs in this action, as to the sufficiency of the publication and of all the steps taken to bring the minor into Court. It precludes investigation into that subject, for the following reasons:

1. The plaintiffs in this action were the appellants in that action, and one of the grounds of error alleged was, that the publication against the infant was insufficient, and that the infant was never brought before the Court,

either by Gray or Eaton, and consequently that the decree was wholly void as to the infant. In that case, the infant had a right to appeal from the decree, whether it had been duly served with process or not.

1. Any defendant against whom a judgment is rendered, and whether served with process or not, may appeal from the judgment. On such appeal, the plaintiff in the suit is estopped to deny the validity of his own judgment. He cannot take judgment against a defendant not served, and then defeat an appeal on the ground that the defendant is not a party to the suit for want of a sufficient service, and therefore cannot appeal. This would be to take advantage of his own wrong. It would be to reason in a circle to say, that a defendant, though not a party, shall be bound by the judgment which he cannot avoid, for the reason that he is not a party. The plaintiff who obtained the judgment will not be allowed to make this objection. As to *him*, the defendant is in Court, and therefore has a right of appeal.

6 Wend., 564.
15 Barb., 47.
3 Gray's R., 508.
Gray v. Hawes, 8 Cal., 562.

2d. The defendant, not served, having a right of appeal is bound by the judgment of the Court to which he appeals; otherwise it would present this absurdity, to wit: that he has by law a right of appeal, but is not bound to abide by the judgment on appeal. If in his favor, his adversary is bound by it; but if against him, it is a nullity. The right of appeal, of necessity, implies that the judgment on appeal will bind the appellant—otherwise, it would be trifling with justice and with the time of the Court, to require them to render a judgment, which, when rendered was not binding on the appellant.

15 Missouri R. 360.
12 Gratt. (Va.) R. 226.
26 Ala. R. 504.
6 Md. R. 224.
1 Greenleaf Ev. §§ 522, 523, 524–528, 534–535.

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3d. It makes no difference in such a case, whether the appellant be an adult person or a minor. The plaintiff who has taken judgment against a minor without proper service, is estopped to deny the sufficiency of the service, for the same reason that he is estopped in the case of an adult. As to him, the minor is in Court and he would not be heard to allege on the appeal that the service was insufficient, as the ground for dismissing the appeal. The infant, therefore, had a right of appeal, which could not have been defeated. It could on the appeal compel the Supreme Court to adjudicate upon the sufficiency of the service and if that decision is not binding on the minor, it would follow that the Supreme Court would be compelled to render a judgment, which, when rendered was a nullity. The whole question turns upon the point, whether an infant not served has a right to appeal. If it has, the conclusion is inevitable that it is bound by the judgment. There is no exception to the rule, that a person against whom a judgment is rendered, with or without service, and whether an adult or a minor, married or single, has a right of appeal in order to avoid an erroneous judgment. If the judgment be void for want of jurisdiction, the defendant need not appeal, but may assail the judgment when it is attempted to be enforced. If, however, instead of trusting to this remedy, an appeal is prosecuted to get rid of the judgment, the appellant is bound by the appeal and cannot again litigate the same questions decided on appeal. *Pro hac vice* the guardian *ad litem* represents the minor, and the plaintiff could not have defeated the appeal on the ground of any irregularity in appointing the guardian, nor of want of proper service on the minor. He is precluded on these points, and as the judgment on appeal bound the plaintiff in that suit, it must of necessity have bound the minor.

Barber v. Graves, 18 Vermont R. 290.

Dewitt v. Post, 11 John. 460.

Arnold v. Sanford, 15 John. 534.

4th. If the appeal was *void* and the judgment on appeal a nullity as to the minor, it was void in toto as to all the parties. It would not bind *one* party, and *not* the other. If this be so, the original judgment is still in force and not reversed, annulled or set aside, and all that has been done, since the first judgment is a nullity. But it is not a nullity as to Wm. H. Gray, because he was estopped to deny the validity of his own judgment; and being binding on him, it must of necessity have bound the minor.

An infant plaintiff is as much bound by the judgment as if he were an adult.

Darvin v. Hatfield, 4 Sandf. Sup. Ct. R. 468.

In an appeal in which the infant is actor, he is bound by the judgment in the same manner as if he were the plaintiff in an original suit.

5th. The point decided by the Supreme Court embraced every question raised in this case, as to the sufficiency of the publication. The Court, in its opinion, thus states it: "The second objection made by the appellants is, *that the Court had no jurisdiction over the person of Franklina C. Gray.*" This, then, was the question before the Court; it embraced the whole question of jurisdiction over the minor. The precise question decided was that the Court had acquired jurisdiction over the minor, and although the Court in its opinion discusses but one of the reasons alleged against the sufficiency of the service, it says the other points made by the appellants are overruled as not worthy of argument. Whatever may have been the reasons on which the Court decided the service to be sufficient, it nevertheless *did* decide that the Court had jurisdiction over the minor and we cannot inquire into the reasons for the decision. The only inquiry is, did the Court decide the *question of jurisdiction*, and if it did, the reasons for the decision are immaterial. If the original case was again in the Supreme Court, would that Court again permit the question of jurisdiction over the infant to be raised? Evidently not, because that precise point was before decided by the Court. The case of Davidson v. Dallass,

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15 Cal. 75, and the authorities there cited, are conclusive on this point. If in that Court, the question would be regarded as *res adjudicata*, and therefore not open for discussion, much more should it be so regarded in a collateral proceeding.

1 Gray's R. 72.
4 Texas, 387.
Embury v. Conness, 3 Coms. 511.
Dewey v. Gray, 2 Cal. 377.
Clary v. Hoagland, 6 Cal. 687.
Gunter v. Lafan, 7 Cal. 592.
Cal. Steam Nav. Co. v. Wright, 8 Cal. 592.
Cahoon v. Levy, 10 Cal. 216.
Soulé v. Daws, 14 Cal. 249.
Bostic v. Love, 16 Cal. 72.
Ex Parte Watkins, 3 Pet. 193.

III.

The decision of the Supreme Court, if not conclusive as *res judicata*, is at all events binding on this Court, as an interpretation by the highest Court of the State, of the statutes regulating proceedings against absent minor defendants. The very point now raised, to wit: The insufficiency of the service, was passed upon by that Court, and in doing so, they necessarily decided upon all the provisions of the statute which were applicable to the case. They have decided that the minor was properly brought into Court. If this Court now decides otherwise, there will, of necessity, be a direct conflict between the two Courts, in construing the same statutes. It is to prevent this, that the Federal Courts, conform their rulings in such cases to the State Courts.

IV.

Even though the service on the minor be deemed insufficient, the decree was not *void*, but only *voidable*. The failure to serve a minor, who is nevertheless represented by a guardian *ad litem*, does not impeach the jurisdiction, as it would in the case of an adult. In such a case the judgment is erroneous; but not void.

Bustard v. Gates, 4 Dana (Ky.) R., 429.
8 B. Monroe's R., 105.
9 Dana's R., 395.

There is no hardship in this rule, because, even if the minor were properly served he may still avoid the decree in a new action instituted for that purpose.

Joyce v. Joyce, 5 Cal., 161.

V.

If an effort be made in a collateral proceeding, to impeach the judgment of a Court of general jurisdiction, for want of notice to the defendants, it will be presumed the Court had jurisdiction of the person, unless its own records show the contrary.

Morgan v. Burnett, 18 Ohio, 535.
Grignon v. Astor, 2 How. 341.

In this case the record does not show the contrary. If any irregularities appear in the judgment roll, they are not sufficient to overcome the presumption in favor of the jurisdiction.

VI.

If the ruling of the Supreme Court, in respect to the sufficiency of the publication in the case of Gray, is not conclusive, it cannot be conclusive in respect to the publication in the case of Eaton; and if that be an open question, it is not difficult to demonstrate, that the Supreme Court erred in holding Eaton's publication to be insufficient. The ground on which the Supreme Court puts its decision on this point, is utterly untenable, as will appear from an examination of the opinion.

VII.

If the publication was good in Gray's case, and bad in Eaton's, the sale by the master was nevertheless valid and operative to convey the *whole* title. The two cases were consolidated and tried together. Thence-

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forth they became but one suit, and hence but one decree was rendered, settling both partnerships. If the infant was before the Court, in either case, that fact gave to the Court jurisdiction over the property and authority to decree a sale of it. Its decree may have been erroneous, but was not void, for want of jurisdiction. It would be strange, if the Court lost its power, in Gray's case, to deal with the property of an infant defendant, properly before the Court in *that* case, because another party, whose action was consolidated with his, had failed to bring the infant before the Court in his case.

The question is: Had the Court the *power* to decree a sale of the property for any purpose, so as to bind the infant? If it had such power in the Gray case, the sale is valid, and cannot be impeached collaterally, however erroneous. If a Sheriff has two executions against the same defendant, one valid and the other void, and the property is sold under both, does not the title pass?

Or if there be two judgments, and one sale under both, is the sale *void*, if one of the judgments is void? But this case is still stronger. Here there was but one decree in a consolidated action, and it is claimed that the sale under the decree is absolutely void, because as to *a part* of the cause of action, the Court had no jurisdiction of the person of one of the defendants. But, as to the other part, it had jurisdiction—the infant was represented and was in Court. Its property was within the control of the Court, and was ordered to be sold. Can it be said, with propriety, that such a sale is void, for want of *power* to make it? But, if the infant was properly brought in, in the Gray case, it was before the Court, for all the purposes of the consolidated action. Being in Court, and represented by a guardian, who consented to the consolidation, no service was necessary in Eaton's case. The object of service is to give notice, and when the infant had notice in Gray's case, and was represented in that case by its guardian, duly appointed, who consented that another action might be consolidated with it, it cannot be said that the infant had no notice in Eaton's case. If there be two actions against a non-resident adult, and publication is duly made in one, and the defendant appears and consents that the two actions be consolidated, can he afterwards avoid a joint decree, rendered in the two actions, on the ground that he had never been served in the second action? So, in this case, after the infant had been duly served in the Gray case, and had appeared by guardian, it was bound by all the subsequent proceedings, including the order to consolidate the actions, in the same manner that an adult defendant would have been. The guardian represented the infant, and had power to consent, and did consent to consolidate the actions. After this, it cannot repudiate the whole decree as a nullity, on the ground that it was not served in Eaton's case. From the time of the consolidation there was but *one* action, and the infant was before the Court in that.

If Eaton, instead of bringing a separate action, had filed a cross-bill, in Gray's case, against the widow and child, after they were once before the Court in that case, and if the infant, by its guardian, had appeared and litigated Eaton's demand, could it have avoided the decree as a nullity, for want of service on the cross-bill? Evidently not, and this is, practically, the case at bar. The order to consolidate the actions was a proceeding in the Gray case, and was made by consent.

If the infant was then in Court, it was bound by that order, and had notice of Eaton's case in the same manner as it would have had of an amended complaint, a cross-bill, or any subsequent proceeding. Henceforth, Eaton's case was only a part of Gray's case, and the two formed but one action. Hence there was no need of serving the infant in Eaton's case.

If the Court had the *power* to sell for any purpose, the sale was valid until set aside, however erroneous; and it is not perceived on what ground the power to deal with the property can be denied if the infant was before the Court in the Gray case.

These principles appear to be distinctly settled in Kentucky in the case of

Thorpe & Burke v. Cotton's Exr., 7 B. Mon., 636.

VIII.

Another point raised on the trial was, that the State Court had no power as a Court of Equity to divest the widow and child of the legal title by means of a master's sale and conveyance. It was claimed that such a power is not inherent in a Court of Equity at common law, and that no such power was conferred by statute. Hence it was claimed that the legal title was still in the widow and child, and must prevail in ejectment, notwithstanding the sale and conveyance by the master. In other words, it was claimed that the master's deed was void, even if the infant was before the Court.

It may be stated as a general proposition, that at the common law, a Court of Equity has all the powers necessary to render its decrees effectual. If it can act directly upon the property which is the subject of the suit, it may sequester, divide, or sell it, and may transfer the title by any appropriate method. If the holder of the title be within the reach of process, he may be compelled by attachment to execute the necessary conveyances. If he contumaciously refuse, or be beyond the jurisdiction, so that an attachment will not reach him, or if he be an infant and incapable of acting, the Court may appoint another to execute the conveyance on his behalf. This is peculiarly true, where the decree acts *in rem*, as in enforcing a mortgage, a mechanic's lien, or a distribution of partnership property. In such cases the Court deals with the property itself, and if it has no power to convey the title, a fraudulent defendant need only absent himself from the jurisdiction, to defeat the decree.

The action here is to establish a partnership and for a distribution of the partnership fund. This could only be done in a Court of Equity. The legal title was in the deceased partner, and the suit was brought to establish an equity and to compel a partition. In such cases, the Court having jurisdiction for one purpose, will do complete justice.

5 Barb., 51.
4 John Chy., 271.
1 Hoff. Chy., 68.
15 Cal. R., 302.
9 Cal R., 129.
5 Cal. R., 116.

The plaintiff had a lien on the partnership fund, and the Court had jurisdiction to enforce the lien and close the partnership by a sale of the property.

1 Story's Eq. § 674—5.
1 Rob. (Va.) R., 20.
3 Lit. (Ky.) R., 295.
5 B. Monroe R., 515.
1 Bland R., 370.
13 Pet. R., 464.
2 Story's Eq. §§ 1216—17 et seq.

That the Court had power to decree a *sale* of the property, in order to close the partnership, admits of no doubt, and the power of sale, necessarily includes the power to make the sale, effectual by a conveyance of the title ; otherwise, the Court could never close a partnership as against an absent defendant.

But under the Statutes of California, the Court has power to do whatever is necessary to the complete exercise of its jurisdiction.

Wood's (Cal.) Digest, 150.
Adams v. Town, 3 Cal. R., 247.

And if the chancellor order a sale he may complete it by appointing a commissioner to convey the title.

Yoder v. Stanford, 7 Mon. (Ky.) R., 478.

Whatever may be the general powers of a Court of Chancery in California to decree and perfect a sale, there can be no doubt as to its power to decree a sale in *partition*, and to perfect it by a conveyance.

This suit was practically for a partition of property held in common, and the statute prescribes how it is to be done.

California Practice Act, § 264 to 309.

All the requirements of the statute were substantially complied with, and even if not strictly pursued, if the parties were in court, the proceedings would not be void, but only voidable on appeal.

But without this statute, the Court had ample power to decree and perfect by a conveyance, the sale of partnership property; and particularly as against an absent and infant defendant. The master's deed, therefore, was operative to convey the title of the widow and child.

IX.

If the decree and sale were even void as against the infant, they were valid as to the widow. She appeared and answered both in the case of Gray and of Eaton. At the time of the sale by the master, the decree was in full force as against the widow, and Eaton's case was only reversed as to the infant; but was affirmed as to the widow.

On the trial in the Circuit Court, the argument on behalf of the widow was, that the decree was a joint decree, and if void in part, was void *in toto*. But this rule only applies where the complaint is for a joint demand, in which case, there cannot be a several judgment.

This rule, however, is abolished by statute in California.

Practice Act, § 32.

At most, it applies only to joint money demands, and has no application whatever to a suit to subject property to sale. Even in respect to joint money demands the rule is otherwise in many of the States.

16 Ohio, 271.
19 Ark. R., 496, 491, 574.
10 Humph. R., 247.
22 Pa. R., 46.
26 Ala. R. 619.

On the trial, a case was cited from 21 Barb., 10. But that was a suit for partition of land in kind, and in the decree there was embraced a tract not mentioned in the complaint, and the Court held the whole decree to be erroneous. But it was a proceeding on appeal, and the Court did not decide it would be void in a collateral proceeding. But if it was so held, it would not touch this case. The partition in kind may have been void, because it embraced too much land; but if the whole property had been sold, it does not follow the sale would have been void, except as to the excess, if for that.

But in the case at bar, there was no *joint* decree, in a legal sense, against the widow and child. The effect of the decree was only to establish the partnership, and it operated only *in rem.* There was no decree *in personam* against the widow and child. In a suit against the mortgagor and subsequent incumbrancers, to foreclose a mortgage, there is but one decree, and it might be termed a joint decree against all, with as much propriety, as this can be said to be a joint decree against the widow and child. And yet in such a case, no one would maintain that the whole decree and the sale under it was a nullity, because one of the incumbrancers was not brought before the Court. As to him, the decree would be a nullity; but it would bind the others. The rule is perfectly well settled, that in sales of property held in common, under execution or by virtue of proceedings in equity, if the judgment is void for want of service on some of the defendants, it is good as to the others, and their title passes by the sale.

2 B. Monroe R. 453.
6 Dana's R., 450.
10 Paige Chy. R., 220.
9 Ib., 28.
16 Ohio R., 271.
18 How. R., 297.
Kirby R., 114.

This is necessarily true where the proceeding is *in rem.* It operates only on the property, and divests the title of those who were in Court; as, for example, in a suit to enforce a vendor's lien; to subject property fraudulently conveyed; to enforce a mechanic's lien; to quiet title, or to restrain a conveyance. In all these cases, the decree binds all those who were before the Court, and may be void as to those not served, and it bears no analogy whatever to a suit to enforce a *joint* demand in which there could not be a several judgment.

But real estate held in partnership is treated as personalty, and whether the legal title be in one or all, is not material. If in one, it is held in trust for the partnership, and each partner has a lien upon it for the balance due.

Gray v. Palmer, 9 Cal. R., 616.
Lafan v. Naglee, 9 Cal., 682.
2 Sandf. Chy. R., 363, 366.
5 Met. R., 562—582.
6 Barb. R., 19.

To enforce this lien and adjust the equities, the Court may decree a sale.

2 Barb. Chy. R., 165.
2 Sandf. S. C. R., 561.
20 Vermont, 460.
1 Story's Eq., § 674–5.

In proceedings, *in rem,* there is no joint decree in a legal sense; but only a subjection of the property to a lien, and the decree divests the title of all who were served.

For these reasons the title of the widow passed by the sale, even though it were conceded the proceedings were void as to the child.

But it was said at the trial, that the widow and child took as coparceners, and in law were but as one heir, and therefore held a joint estate, which could not be divested except by a valid *joint* decree.

Coparceners always take by descent and by virtue of consanguinity. But the widow does not take by descent, but by act of law, because she was the wife.

She takes as widow, and not as heir.

2 Black. Com., 187.

Therefore the widow and child were not coparceners. But if they were, it would not be material in a proceeding *in rem*, for the reasons already given.

It was further urged on the trial that the decree in this case was only *process*, and that all process must be good in whole, or bad in whole; that it is not divisible, and if void as to the child, it was void *in toto*. The reply to this is, that the decree is *not* process in the sense contended for. It is no more process than all decrees are process.

X.

The sale having been made whilst the decree was in force, and the purchaser being an innocent party who paid a fair price, his rights are not affected by a reversal of the decree. It is perhaps useless to cite authorities on a proposition so well settled, not only in California, but in this Court. No prudent man would buy at a judicial sale, if he was to lose the land, because of the subsequent reversal of the judgment.

To show how firmly the law is established on this point, the following authorities are cited:

Grignon v. Astor, 2 How., 340.
Bank U. S. v. Bank of Wash., 6 Pet., 8.
U. S. v. Nourse, 9 Pet., 8.
Voorhies v. Bank U. S., 10 Pet., 449.
Reynolds v. Harris, 14 Cal. R., 667.
Farmer v. Rogers, 10 Cal. R., 335.
Gray v. Haws, 8 Cal. R., 568.
Whitwell v. Barbier, 7 Cal. R., 54.
Knight v. Applegate, 3 Monroe's R., 339.
Parker v. Anderson, 5 Monroe's R., 451.
Doe v. Swigget, 5 Blackf. R., 328.

Acts done under a *fraudulent* judgment, so far as they affect third persons, are valid.

Wise v. Slocum, 3 Cranch, 300.
Blight v. Tobin, 7 Monroe, 619.

It is also to be observed that the decree in Eaton's case was not reversed as to the widow, but was affirmed as to her, and remained as a final decree. It cannot therefore be claimed that she is not bound by it.

XI.

The Circuit Court had no jurisdiction of this action, so far as the infant was concerned, because the law requires an infant to sue by *guardian*, and prescribes the method.

See California Practice Act, §§ 9, 10.

This statute had been adopted as one of its rules by the Circuit Court.

This suit was brought by the infant, not by guardian, but by its next friend.

The statute requires the guardian to be appointed by the Court or Judge *before* the suit is brought. No such appointment was made in this case, nor any order made authorizing the next friend to prosecute *this* action. There was obtained from the Circuit Judge an order authorizing suits to be brought by next friend; but *this* suit was not specified, nor any particular suit.

On a statute similar to this in New York, it has been held that a complaint by an infant will be dismissed, unless brought by guardian.

3 How. Pr. R., 407.
13 Wend., 575.

It goes to the jurisdiction. The infant was not before the Court. The omission appears on the face of complaint, and in such cases the suit will be dismissed on motion at any time pending the trial.

This point is well settled.

Conkling's Treatise, 407.
4 Wash. C. C. R., 624.

And even after verdict the judgment will be arrested.

Pet. C. C. R., 431.

Or a writ of error will lie.

4 Dall., 7.
1 Cranch, 343.
2 Cranch, 9.
3 Cranch, 515.

And that even at the suit of the plaintiff for his own omission to aver jurisdiction.

2 Cranch, 126.

In this case the Court never acquired jurisdiction over the infant's cause of the action, and ought to have sustained the defendant's motion to dismiss the complaint as to the infant.

On the whole case, we insist that the judgment ought to be reversed as to the infant, and affirmed as to the widow.

J. B. CROCKETT,
Of Counsel for Plaintiffs in Error.

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Supreme Court

OF THE

UNITED STATES,

No. 223.

MATILDA C. GRAY,

Plaintiff in Error,

vs.

SANTIAGO BRIGNARDELLO, *et. al.*,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

HALL McALLISTER, of San Francisco,
PHILIP G. GALPIN, of New York,

Counsel for Plaintiff.

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United States Supreme Court.

MATILDA C. GRAY,
Plaintiff in Error.
vs.
SANTIAGO BRIGNARDELLO, *et. al.*,
Defendants in Error.

BRIEF FOR
PLAINTIFF IN ERROR.

FACTS AND PLEADINGS.*

This is an action of ejectment brought in the United States Circuit Court to recover a fifty *vara* lot in the City of San Francisco. Both Plaintiffs and Defendants claim under the title of Franklin C. Gray. Mr. Gray died July 15th 1853, leaving a widow, Matilda C. Gray, and a post humous child, Franklina C. Gray. He also left real estate of the value of over $100.000, the title to which depends upon the determination of this action. This real estate was deeded to F. C. Gray alone. By a Statute of California, the widow and child inherited this land in equal shares.

We claim that by force of that Statute, they became co-parceners. As such, and in accordance with the Rules and Practice of the Circuit Court, they joined in bringing this action of ejectment. The Declaration or Complaint contains two counts, one of which alleges

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*** This statement is nearly identical with that in Brief in case No. 169.**

a *joint* seisin by the Plaintiffs, the other does not. The defence is, that soon after the decease of F. C. Gray, an action was commenced against the heirs and the Administrator, in which the realty was ordered to be, and was sold, under direction of the Court; and the Defendants became purchasers under that sale.

To this Plea, the Defendants below replied, that they were not summoned, and did not appear in said last mentioned action; that the decrees and proceedings therein were fraudulent and void, of which, the Record give notice to all purchasers; and that by the reversal of the decrees in said action, as well as by reason of various defects, and irregularities, in the sale, and deed, the purchasers failed to acquire the title of the heirs.

On the trial, the Plaintiffs below established their title. To deraign title from them, the Defendants offered, in evidence, the record of the action, in the State Court. On objection taken, the Court below decided, as a matter of fact, that the child Franklina, was not served in, and was not a party to, said action, and the record could not be read as against her. It was admitted however, together with the deeds; and the Court charged the Jury, that the record, being no record as to the child, she should have a verdict, for a moiety of the premises, but that the record and deeds, operated to divest the title of the widow: a judgment was thereupon entered, in favor of the child, for an undivided moiety of the premises, but against the widow. Such a several judgment is provided for, by the Rules and Practice of that Circuit. From this judgment, a writ of error was taken out against Franklina C. Gray, which is case No. 169 upon the docket; and another writ of error was taken out, by Matilda C. Gray, which is the present case. In both cases, the only question is, *as to*

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the admissibility of the Record, and proceedings under it, in the State Court: and, *if admitted, as to their effect*, upon the title of the heirs of Gray.

SYNOPSIS OF RECORD OFFERED BY THE DEFENDANTS BELOW.

Jan. 18th 1854, W. H. Gray, a brother of the deceased, and a resident of California, filed a bill in equity, in the Fourth District Court, against Joseph C. Palmer, and Cornelius J. Eaton, Administrators upon the Estate of F. C. Gray, also against the widow and one, James Gray. Subsequently, the Plaintiff sought to join Franklina, as a party. The heirs, being residents of New York, the Plaintiff undertook to obtain service of summons by publication. The Complaint alleged, that since the year 1849, a partnership had existed, between the deceased and the Plaintiff W. H. Gray. That this partnership was carried on, and large amounts of real estate were purchased, in the name of F. C. Gray alone: that this partnership was limited to no particular *time*, *business*, or *property*, but embraced, within its comprehensive grasp, all affairs and all possessions of the decedent. The scope of the bill was, to settle and dispose of the alleged partnership business, and property.

April 5th 1855, Cornelius J. Eaton, a clerk of the decedent, who, as Administrator, had repudiated the claim of W. H. Gray, (see Record p. 30) resigned his trust, and also filed a bill against the heirs and his former co-administrator, Palmer, (Record p. 124-5.) He did not join W. H. Gray as a Defendant. Mr. Eaton alleged the existence, between himself and the decedent, of a universal and dormant partnership, precisely similar to that, previously set forth by W. H. Gray: to his complaint was annexed, however, this alleged contract of co-partnership, under which he claimed one fourth, instead of one third of the Estate.

Upon petition of each Plaintiff, the same person appeared, as guardian *ad litem* for the child, and he also appeared as Attorney for the widow.

The time for the publication of the summons, having expired in the Eaton case, the claimants appear to have come to some understanding.

Oct. 22d 1855, All parties signed a stipulation, that Eaton amend his complaint, by making Wm. H. Gray a party Defendant. (Record p. 49 [112.])

Oct. 23d 1855, With commendable punctuality, Wm. H. Gray filed his answer, in which, as an evidence of his own good faith and the absence of all fraud, he swears, that Eaton "has no interest" in the partnership property of F. C. Gray! (Record p. 50 [113.]) Eaton had formerly sworn the same in regard to Gray's claim! (Record p. 30.)

Oct. 23d 1855, W. H. Gray's objections to Eaton's claim being apparantly overcome, all parties signed a consent, that these two actions be consolidated. (Record p. 39 [90.])

Oct. 27th 1855, A joint decree was this day filed, which determined, that a dormant and universal partnership had existed between F. C. Gray and Eaton, and that a similar one, had co-existed, between Wm. H. and F. C. Gray: that Eaton should first, take his one fourth, of the Estate, then W. H. Gray, one third of the remaining three fourths,—leaving two fourths, to be equally divided, between the widow and child. There was no danger to the claimants, however, from this latter provision, because the decree, also, provided, for a reference, to state the partnership accounts! as well as, for a sale of the entire estate, and a division of the proceeds.

As it had not occurred to these alleged partners, to draw monies from this "firm," *during the life time* of

F. C. Gray, and as he had been in the habit of spending his money *just as freely as though it had been his own*, it naturally enough turned out, upon a statement of these partnership accounts, that he was largely indebted, to each of these alleged partners! The entire real estate was sold at auction, before the personal, and the shares, which, under the decree, belonged to Wm. H. Gray and Eaton, were paid over to them. From the statement of the back accounts, it appeared, that the indebtedness of the decedent, to his alleged partners was so great, that it entirely swept away the portion of the widow and child; in fact, there was not enough left, to pay for the decedent's tombstone!! (see Record p. 123.) Indeed, out of this estate, inventoried in the Probate Court at over $230.000, (Record p. 38.) not only was there nothing left, but the estate was actually indebted to W. H. Gray, in the sum of \$3533 $\frac{17}{100}$ for which he had judgment! It also appears, that this decree of October 27th does not recite that "any trial was had," nor, that the decree was "entered by consent:" although the judge who entered it, so certified at the foot of the decree some months afterwards! (Record p. 55.)

May 3 1856, Without any *decree* fixing the indebtedness to W. H. Gray, mentioned in the Report, and without any order of sale, the Commissioner this day sold the lot in question to Defendant Brignardello. (Record 90 [198.])

Sale
& Or

May 14 1856, Report of sale filed, and an order of sale entered *nunc pro tunc* as of April 7. (Rec. p. 95.)

nunc
pro tu

May 26 1856, Deed to Brignardello. [Rec. p. 129-130]

June 13 1856, A fraudulent decree of distribution entered by consent, including $8000 to attorneys for Wm. H. Gray! (Record p. 96.)

June 21 1856, Re-sale of a large portion of premises (Record p. 97.)

July 21 1856, Report of sale filed. (Record p. 99.)

Nov. 21 1856, Reports of sale and distribution of proceeds made this day, and final decree of confirmation filed! This is the *first* confirmation in the record. (Record p. 105.)

April 13 1858, Remittitur and reversal of above decrees and proceedings in State Court sent down. (Rec. p. 106.)

April 6 1861, The Complaints of both Gray and Eaton, finally dismissed in Fourth District Court, (Rec. p. 117.)

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BRIEF.

I.

Conceding that the lot was partnership property, the entire sale was void and did not operate to pass any portion of the title, because Franklina C. Gray, who was one representative of the interest of her father in the partership, and who was also a coparcener with her mother in the realty, was no party to the order of sale in the State Court.

Had this sale taken place under a judgment and execution at law, the entire judgment, execution and sale would have been void for want of service of process upon Franklina.

Thus, in Richard *vs.* Walton, 12 Johnson, 434, one defendant only was served with a warrant in trespass, judgment was had against two. On *certiorari* it was claimed that the judgment might be affirmed as to the one served, and reversed as to the other; but it was held that "This may be done where the judgments are distinct, as in cases of *damages* and *costs*, in which the judgment may be reversed as to one and affirmed as to the other; but where the judgment is *entire*, there must be a total affirmance or reversal. Thus at common law in an action of trespass against three, if one die pending *the writ*, and yet judgment be given against all *three*, the *whole judgment* must be reversed because it is entire, although the writ abated but against one. So in trespass against several, if the judgment be erro-

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neous, because one of the defendants was within age and appeared by attorney, the judgment shall be reversed in toto (Bac. Abr. Error M, and cases there cited) * * * * The justice might possibly be authorized as the action was trespass, to treat the defendants as severing, and have given judgment against Richards; but as the judgment is against both and entire, it must be reversed."

So in Cruikshank *vs.* Gardner, 2 Hill, 333, an infant having appeared by attorney, together with another defendant, and judgment being had against both, it was held "That the judgment was *entire*, and being reversed as to the infant, must be reversed as *to all*." It was not good as to the person served. See also Arnold *vs.* Sandford, 14 Johns., 417; Farrell *v.* Calkins, 10 Barb., 349; Vanschoonhowen *v.* Comstock, 1 Denio 655–540.

In Holbrook *vs.* Murray & others, 5 Wend, 161, the declaration was in debt against several, *on a judgment* obtained in Massachusetts. One defendant claimed that in the action in Massachusetts he had not been served with process. The Court says: "As to him the judgment is not conclusive, it is not even evidence of a demand—it is a nullity. What effect has this on the *other defendants whose plea does not afford any defence*. The judgment is *entire*, and if void as to one defendant, where there were several, it is void as to all. This precise point was decided in Hall *vs.* Williams, 6 Pick, 247."

The natural and logical sequence of this doctrine of the entirety of the judgment is the entirety of the process issued upon it.

Thus in Woodcock *vs.* Bennet, 1 Cowen, 711, real estate was sold under an execution issued against two defendants more than a year and a day after the death of one without the revival of the judgment by *scire facias.* A *bona fide* purchaser lost his title because (see page 736) in this case the charge was "on the "realty and did not survive, the lands of both defendants were holden, the execution issued against *both*, "the *right and title of both* were *sold* and *conveyed* by "the sheriff to the appellant. For aught that appears at "the time that the judgment was rendered, the deceased, "defendant, had equal title to the lot with the survivor. "This execution then was manifestly irregular, for we "have seen that a stranger cannot be affected without "making him a party * * * * * The execution may "be said to be irregular and void, for it directs to levy "on the goods and chattels of a person not in being, "and for want thereof to cause the amount to be made "of his lands, which may have been held by persons "*strangers to the judgment* and *ignorant* of the proceedings. This doctrine is fully recognised in Morton *vs.* "the Terre Tenants of Croghan (20 John., 106) where "it is held that a judgment creditor who proceeds to "enforce his lien on real estate, if it becomes necessary "for that purpose to revive the judgment, must make "all the terre tenants parties to the *scire facias.*

"Independent of the adjudged cases on the distinction of void and voidable process, it seems to me that "to sanction such a proceeding would be an invasion "of one of the great principles upon which our security "depends under a government of laws, that no person "shall be put out of his freehold or lose his goods and "chattels unless he be duly brought to answer or be "forejudged of the same by due course of law * * * "It is no answer to say that one of the defendants was "living who might avoid the execution, and has, in "fact, procured it to be set aside.

"The objection is, the *the law forbade the issuing it,* "*so as to affect the representatives of the deceased de*" *fendant.* * * * * Neither can it be successfully con" tended that this execution was *merely* voidable as to " Benjamin Pulten (the party surviving); because if " the doctrine I have advanced be correct, it follows " that the execution *in toto and not in part* is *void.** * * " I am not aware of any qualification of the rule by " which process confessedly void in one material part, " can be upheld and supported as valid for residue. * * * * It seems to me clear that on principle and " authority this execution was *void*, and if so, *no title* " was acquired by appellant" (the purchaser under execution). In this case the purchaser lost not the title alone of the decedent, but also of the survivor. The whole sale was void as unauthorized by law.

This Court held substantially the same language in Erwin's Lessee *vs.* Dundas, 4 How. U. S. Rep., 58, 59, 75, 76, &c.

In that case there were two defendants, one of whom had died; it was held "as to the real estate of the defendants, the charge does not survive, and the execution must go against the lands of *both*, and as it cannot be regularly issued as against the deceased codefendant, nor be allowed to charge the estate in the hands of his heirs, &c., until they have notice and an opportunity to set up a defence, if any, to the judgment, a *scire facias* is indispensable to the regularity of the execution. It will be seen, therefore, upon these authorities, that the same objection exists both in principle and reason, as it respects the enforcement of a judgment against two by a sale of the real estate on execution after the death of one, which have been shown to exist against the enforcement of the judgment

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against a single defendant after his death. For, as the charge of the judgment upon the lands does not survive, but continues upon the lands of both after the death of one, the same as before, and cannot be enforced against the real estate of the survivor alone, as in the case of personalty, and the execution must therefore be issued against both, if issued at all, it is obvious that the lands of the deceased are, in that event, as liable to be sold by the sheriff as the lands of the survivor."

"The rights of the heirs and devisees, and the reasons for protecting them by *scire facias* are the same in one case as the other. * * * * And when the law disables the plaintiff from suing out an execution against the real estate on a judgment against one defendant after his death, it must equally disable him from suing it out on a judgment against two after the death of one. Otherwise, in both cases the interests of new parties upon whom the estate has fallen is liable to be suddenly, and without notice, divested by the silent and till then dormant power of the law; parties, too, who from their age and situation in life, will not unfrequently be the least qualified to understand and protect these interests, being the children of deceased defendant. Finally, the judgment was irregular and *void*, and the sale and conveyance of the real estate of the deceased to the plaintiff under it was a nullity."

The above were cases at law. Following this principle of the Courts of Law, and actuated thereto by the same views of public policy, Courts of Equity have insisted upon the entirety of their decrees. When an indispensable party was not before them they have refused to do justice by piecemeal, and have reversed the case as to all the parties.

Thus, in Russell *vs.* Clark, 7 Cranch, 72, 98, 99, the Supreme Court says, "in this case the assignees of Robert Murray & Co. are so essential to the merits of the question, and may be so much affected by the decree, that the Court *cannot* proceed to a final decision of the case till they are parties. * * * * The assignees have a right to contest the claim of Nathaniel Russel, and may either deny its original validity, or show that it has been paid. They are then essential parties, and the Court ought not to decree in favor of the plaintiff without them. * * * * The Court will, in this case, set aside the decree of the Circuit Court dismissing the bill, and remand the cause with leave to make new parties." The entire decree was reversed.

In Lee *vs.* Wickliffe, 1 Monroe, 110, "all the parties against whom the bill was exhibited being necessary parties, it was *irregular* to pronounce a final decree dismissing the bill as to part of the defendants and continuing the case as to others."

In Conn *et al*, *vs.* Penn, 5 Wheat 424, "the object of the bill was to obtain conveyances from John and William Penn, of certain lands which they were supposed to hold as tenants in common (page 718). Decree made when one defendant was not before the Court, Ch. J. Marshall says, "It is unnecessary to decide this point (referring to another point made) because we think the interlocutory decree was *irregular* and *ought not to have been made until William Penn*, a tenant in common with John Penn, was before the Court. Decree reversed and cause remanded."

In the case of Cameron *vs.* Roberts, 3 Wheaton, 591, there were three defendants, over one of whom the Circuit Court had jurisdiction, but over two of them it *had none*, and a decree was pronounced for the plaintiff. This Supreme Court there decided "That if a *joint interest* vested in the defendant over whom they had acquired jurisdiction, and the other defendants (over whom they had not) the Conrt had no jurisdiction over the cause. But that if a distinct interest vested in the defendant within the jurisdiction, so that substantial justice, as far as he was concerned, could be done without affecting the other defendants, the jurisdiction of the Court might be exercised as to him alone."

In the case of Cowithe *vs.* Griffin, 21 Barb., 10, 15, 16, which was an action of partition, the Commissioners in making partition had included land not mentioned in the petition; it was held "That the partition was a unity, and could not be so severed as to save one part, while the other was lost." The entire decree was held void.

In Graham *vs.* Elmore, Har. Ch. 265, the impracticability of dividing up an action, so as to have a decree affecting the rights of a portion of the parties on the record and not the remainder, is forcibly pointed out. "From the view I have taken, that the decree taken against Elmore, in the case of Elmore and Hicks, was irregularly entered and must be set aside, it must follow that all proceedings under that decree must fall with it. The case being presented, I am bound to settle the practice of taking decrees against one of several defendants in this way, in one way or the other, and of the inconvenience and irregularity of this course of proceeding I entertain no doubt. The final decree entered in this cause against Elmore must be set aside and *vacated.*"

In the present case the power, if any, of the Court to order a sale of this realty was derived solely from its peculiar jurisdiction over partnerships and partnership property. This power was to be exercised over a certain *rem*. The decree was a *quasi proceedings in rem*. The realty—the lot as described by metes and bounds—was what the Court might have had power to sell, what it undertook to sell—what it did sell. This lot belonged in part to Franklina C. Gray, and before her title could be divested the Court should have acquired jurisdiction over her. In an action whose sole end and object is to dispose of the entire property, pay debts, and wind up the partnership, has Equity power to make a decree of sale of partnership effects when an heir, the representative in part of one partner, is not before the Court? Such a decree would not dispose of the entire partnership property. Instead of closing the business, it would be opening the door to further litigation.

It is said: "True, the sale is "void as to Franklina, but it is not void as to her mother, "because "she was a party. The sale was effectual to pass "what title she had. The decree may be split up, "so that, that decree which ordered the sale of one "entire rem, viewed as a unit bounded by visible ex- "ternal limits and designated as 'real estate of the "partnership,' may be intended to mean 'whatever "interest therein Matilda C. Gray happened to have."

Suppose upon a bill, in all respects like the present, the decree had provided for a sale—not of the partnership property (that rem which the Court might have had jurisdiction to sell)—but of the "interest of M. C. Gray," in said property, and had proceeded to saddle that interest with the burthen of the partnership debts, we submit whether the Court would have had any power to make such a decree.

If the reasons given in Woodcock *vs.* Bennet and Erwin's Lessee *vs.* Dundas, are the true reasons for those decisions, they apply to the present case and are authorities here.

It is vain to say that there is a technical unity about an execution at law, which does not permit it to be held good in part and void in part; and there can be no such unity entirety in a decree in equity.

The unity or entirety of the execution at law is not an empty technicality, but is based upon sound reason of public policy. If a decree directing the sale of a specific rem can operate to pass so much of the interest in that rem as happened to be held by one co-parcener or joint tenant, who is served with process, and can be held void as to another co-parcener or joint tenant not served, and there is no inherent objection to this apportionment, then why may not the same doctrine be applied to an execution at law, and why is not this idea of the entirety of such execution an empty technicality unworthy of modern and progressive jurisprudence? If, however, there is any sound reason for holding an execution to be an entirety, why do not the same reasons apply with the same force to a decretal order of sale in equity?

Again, if the Court constructively authorized the sale of Matilda C. Gray's interest, that interest in the partnership property was undefined; it could not be defined without determining in effect the interest of the child. This latter the Court had no right to do, because the child was not before it.

By this sale the infant has been directly prejudiced. Under it other and possibly now irresponsible parties have acquired possession of her land. She has under-

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gone great expense in litigating her title. The record shows there was no authority of law to make the decretal order of sale. The objection is that the Court issued the order without having authority of law to make it; and how can it to any extent, even the least, be upheld?

If the Court had no power to issue that order the proceeding was void, and the plaintiff in error may as well take advantage of this want of power as could the infant herself.

Again, in the present case the mother and child were co-parceners, who together held but one title, and constituted one heir. Unless both were served with process the purchaser acquired nothing, for Matilda C. Gray alone had no legal title.

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They were co-parceners.

By the statutes of California, passed April 13, 1850 (see Comp. Laws, Cal. p.   ), whenever "any person having title to any estate, &c., shall die intestate as to such estate, it shall descend and be distributed subject to the payment of his or her debts, in the following manner. 1. If there be a surviving husband or wife, and only one child, or the issue of one child—in equal shares to the surviving husband or wife and child."

The widow and child here, by force of this statute, had unity of title, time, interest and possession. They were not joint tenants, because "joint tenancy can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of the law," 2 Bl. Com. 180. Nor were they tenants in common, because "tenants in common are such as hold by several and distinct titles, but by unity of possession. * * * The

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only unity there is, is that of possession" (2 Bl. Com., 191, 192):

They were co-parceners.

"The properties of parceners are in some respects like those of joint tenants—they have the same unities of interest, title and possession." 2 Bl. Com. 188. "An estate held in co-parcenary is where lands of inheritance descend from the ancestor to two or more persons." 2 Bl. Com. 187.

We claim that in California, by force of the statute, this widow and child took the precise estate which under the Common Law passed, where a person seized in fee simple or fee tail died, leaving two heirs female—daughters, sisters or aunts, or their representatives. In such cases the heirs inherited equally.

So, too, sometimes by particular custom lands descend, as in gavel kind, to two heirs male in equal degree. They are held as co-parceners. For the distinctions between joint tenantcy and co-parcenary, see 2 Bl. Com. 187.

Title by co-parcenary had not been abolished in California in 1857, but was recognised in a statute of that year, (see Stat. Cal. 1857, page 62) providing that "co-parceners might join or sever in actions pertaining to the realty." This act, it will be observed, had not been passed when the decrees mentioned herein were made.

If the widow and child can, in such a case, be considered co-parceners, then, as they had but one title, and constituted but one heir, "that title could not" in the words of Lord Coke, "be taken away by the precipe of a stranger who had joined but the one." 2 Coke, Litt. 3d book, 163a, 163b, 164a. 13 Petersdorf's Com. Law, p. 75, note. 2 Bac. Ab. 356, 357.

II.

But if the title of Matilda C. Gray alone was all that could have passed under the sale the advertisement of the property to be sold was erroneous, and the sale was, for that reason, invalid.

The decree of October 27th directs (Record p. 54 [121]) that the Commissioner do "proceed to sell, with all convenient speed, according to law, and the rules and practice of this Court as in sales under execution," &c. The statute of California provides that the property to be sold shall be advertised [Comp. Laws Cal. pp. 560 & 221] &c. An advertisement of the sale of the entire lot by metes and bounds (See Record, pp. 89, 90) was not a legal advertisement of the property to be sold, which was the interest of Matilda C. Gray in said land, and that interest should have been defined. Many purchasers might have been deterred from attending the sale by want of means to purchase an entire lot who would have attended had they known they could have purchased an interest therein.

The doctrine that the greater contains the less does not apply here. Public policy demands that the public and the owners know exactly what is to be sold. To this point we have presented this case as though these irregular proceedings had never been vacated in the State Court. They have been.

III.

The final decree and the interlocutory decrees of sale having been reversed and vacated for irregularity in not serving Franklina, as well as for error, and both bills having been subsequently dismissed, the sale fell with the decrees by which they were supported.

It will be said that the reversal of the decrees of October 27th (Record pp. 51, 106–7) and of November 21st, (Record pp. 105, 106, 107) did not affect the title of the purchaser, by reason of the well settled rule of law, that "a purchaser under the execution is not affected by a subsequent reversal of the judgment."

It is said in Bac. Abr. Tit. Error M. 1, (citing Aleyns Rep. 1, 1 Ld. Raymond, 600) "the judgment may be reversed for error, but the authority of the *writ* stands for it is *distinct* from that of the *judgment.* The one is the direct command of the king to the sheriff, directing him to sell, the other is the declaration of the law.

So, if an execution had been issued in the name of the People upon this decree in equity, as is the practice in some States, the original decree might, by possibility, have been reversed, and yet the sale made under the writ, issued by a distinct authority, have been good.

In many cases, which will be cited on the other side, the land was not sold under an order of the Court, but under an execution based on the decree, in accordance with the provisions of State statutes. Such cases do not apply here, because such decrees, like judgments at law, may be reversed, and the separate authority of the execution remain untouched.

Possibly, too, where the final decree, settling the rights of the parties, and being the decree on the merits from which the appeal is taken, is brought up for review, some appellate Courts might say, "We will reverse the decree for error, but such reversal does not affect the rights of a purchaser purchasing under a subsequent order of salewhich is not reversed. This order of sale may stand, and is not necessarily affected by a reversal for error of the prior decree."

And so, when the appeal is taken from the final decree, or order of sale alone, the Court might say, as this Court has done, "This appeal from the order of sale, which was subsequent to the decree which settled the whole merits of the controversy, does not open such *prior* decree. We cannot examine here into the merits of the controversy, but can only pass on the regularity of the sale." Hay *vs.* Scholen, 7, Ohio, 48. Kern *vs.* Foster, 16, Ohio, 274.

It will readily be perceived that none of these cases are in point here, owing to the peculiarities of this case. Here an appeal was once taken and dismissed from the decree entered October 27th. (Record, page 38.) Subsequently an appeal was taken from the later decree of November 21st, made after the sale was had. After much argument and grave deliberation, the Court of last resort in California, whose judgment is surely decisive upon a question of practice; under their own statutes, and in their own courts, decided that the final decree, from which the appeal should be taken to reach all errors, even on the merits, was the decree of November 21st, (Record pp. 107, 108,) and that Court then reversed, not only the decree of November 21st—the one appealed from—but the decree of October 27th. finding the facts of the partnership with Gray & Eaton, When they have thus swept away all the decrees in the case, including every semblance of an authority to sell, how can it be claimed that the sale still stands? Here is gone not only judgemnt but execution.

Here was not a "distinct authority" existing after reversal of a judgment, but a total annihilation of any semblance of "authority" for the sale.

In Wambaugh *vs.* Gates, 4 Selden, 138–144, wherein was a sale under a decree subsequently reversed, it was said "the sale fell with the authority which supported it." Nor in the present case can it be urged that these purchasers had any equity; for, in the first place, this decree was not reversed for an error solely, of which they might have had no notice, but also for an irregularity patent on the face of the record,—which every purchaser was bound to see, and which those purchasers who wanted to see it, did see,—as is evident from the fact that many refused to complete their purchases, and the land was re-sold. (Record, p. 99, 222). Secondly, the purchasers all took subject not only to any subsequent action of the Chancellor in the matter, but subject to our right of appeal within one year. If they had been satisfied to have been let into possession at once, and waited until the year expired before paying their money and taking their deeds, they would have been protected; but if they chose to rely upon that section of the statute of California, which gave them a remedy against the plaintiff, provided that by a reversal they lost their property. (Comp. Laws. Cal.) they, and not we, are to blame; nay, this very section shows that the Legislature of that state contemplated the contingency of an innocent purchaser's losing his property by reason of a reversal, and they here gave him his remedy.

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Again, as has been suggested, the purchasers bought, subject to our right to appeal within one year from the decree of confirmation. We did appeal and reversed that confirmation and the sale. They took *pendente lite.*

Now this appeal was the same action between the same parties, transferred to a higher tribunal.

All authorities cited, to the effect that, on a reversal upon a bill of review, the title of the purchaser is not lost, do not affect our position, that the defendants were *pendente lite purchasers;* because a bill of review commences a new action, and a different one from that in which the decree was rendered; the purchasers then, by possibility, are not bound by the result of the new action commenced after their rights were acquired, and based upon equities existing antecedent to their title, of which they were ignorant. But this appeal is part of the same action, in which and out of which their title grew, and the action is not terminated until the appeal is determined. Having bought prior to that determination, they bought pendente lite, and take subject to the appeal.

But whether they do or not, when the decree is reversed for error alone—clearly when the reversal is for an irregularity of which the record gives them notice, and when it is a reversal of every decree and order of sale, they must be bound by that reversal, and with it lose their title. Their remedy is against the plaintiffs in that action.

That an appeal is a continuation of the same action was decided in Fenns *vs.* Dickinson, 4 Denio, 84; Traver and Nichols, 7 Wend, 434.

In 1 Halst, 305, it was held that a sci. fa. was a new action, and in Flynn *vs.* Dickinson, that a *certiorari* was a new action, and how much more is a bill of review?

Our point is, that the appeal is a continuation of the action in which the purchasers acquired title; that having thus bought pendente lite, they take subjecct to the determination of the appeal—that by the reversal of all the decrees and orders of sale for irregularity they lost their title.

But we now go one step farther back, and say that no authority to sell this lot was ever given.

IV.

No authority was ever given to sell this lot, either by the decree of October 27th, or that of May 14th.

First—There are but these two decrees in the record. That the decree of October 27th gave no specific authority to sell this lot is manifest.

1st. The words of the decree are (Record 54); "*after* "he (the Commissioner) shall have made such reports "as aforesaid, and the same *shall have been passed upon* "by the Court, and in accordance with such further directions. &c., &c., do proceed to sell."

The nature and effect of this decree have already received, in this very case, a judicial construction from the Supreme Court of California (Record, p. 108, 240.) "The acts necessary to carry the decree into effect were clearly ascertained and specifically stated. In the present case the fact of the partnership, and the original proportion of each partner in the partnership, were settled; but the partnership accounts had to be taken, and the question whether any of the real estate should be sold, and what portion remained open."

This is the law of the case—the exposition of the Supreme Court of California upon the effect of a decree made in a State Court. Manifestly the Courts of the United States will accept the law thus declared, and hold that even after the decree of October 27th, "the question whether any of the real estate should be sold and what portion remained open."

2d. The decree provides that the Commissioner shall make a "Report of his actings and doings," and it is not until he shall have made such "Report, and the same shall have been passed upon by the Court, and in accordance with such further directions, if any, &c., that he is to "proceed to sell." This decree obviously gave him no direction to exercise any power of sale. Now this report was not passed upon by the Court, nor did the Commissioners receive any further directions to proceed to sell. Assuming probably, that all the property mentioned in his report was partnership property, and that the Court would confirm his report, and that it would order a sale, he proceeded to sell the property, May 3, 1856.

Second—Eleven days afterwards, and on May 14th, the plaintiffs entered their order of sale, and to strengthen this somewhat tardy authority, procured an order that it be entered *nunc pro tunc* as of a day before the sale, to wit, the 7th of April; and "in lieu," as is said, of a decree made on that day. Whether there ever was any decree made on that day, or what it was, or whether it authorized this sale, is a matter of conjecture. Whatever it was, however, is entirely imma-

Nunc pro tunc

terial, since it was vacated and superseded by the decree of May 14th, entered in lieu of it.

Can an illegal act, done without any authority, be thus supported by a subsequently underlaid, but antedated foundation?

If so, a sheriff may take one's property or life, in advance of the verdict, and find his authority in a subsequent execution or sentence, entered *nunc pro tunc*, as of the day of trial.

If we are right to this point, neither the decree of October 27 nor May 14, furnish any authority for the sale, and the plaintiff must recover.

But if we are entirely wrong down to this point, and if the order of May 14th can, by a legal fiction, be made to precede and furnish authority for an act which followed it, still the decrees of October 27th and of May 14th, did not authorize the sale of this lot, because—

Secondly, Neither the decree of October 27th nor of May 14th, found the existence of any lien or debt, in favor of any creditor or partner; but it is only to discharge such lien or pay such debt, that partnership realty could have been sold in such a form of action.

Equity has no arbitrary power in such a case as the one disclosed by the complaints in the State Court, to order a sale of real estate of a partnership. Unless actually required to pay debts, it ought, as suggested by the Supreme Court of California (Record pp. 112), "to be partitioned:" and, in fact, could only be sold in proceedings in partition. It is not the mere fact that realty thus held is partnership property, which gives the Court the power to sell. It is the fact that the debts of the partnership are a *lien* on the realty—which *lien* equity enforces by a sale.

mere error

See this doctrine expressed in 3 Bibb. 185; Codwise *v.* Taylor, 4 Sneed, 346; 5 J. C., 35; 3 Blackf, 457. If there are no debts the partner who does not hold the title should file his bill to enforce the trust, obtain a decree that he is entitled to a portion of the fee, and then partition like any other tenant in common: why, because he and the decedent were partners, should the Court have a power to sell their land, which it would not have were they simply joint tenants. So far as the power of the Court to sell the land is concerned, what difference can it make that the channel through which the holder acquired it was a partnership?

No, it is the *debts* to creditors or partners which constitute the lien, which equity may then enforce by directing a sale to pay such debts.

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In the present case it is not pretended that at the date of this sale there was any decree finding one dollar of indebtedness due by this so-called partnership (See Record, pp. 51, 95).

If the power of equity to sell is dependent on the existence of the lien or indebtedness, this record, which shows no debt existed, discloses that the Court acted without authority.

It is true, that *after* the sale, and in June, 1856, a decree (by consent again—Record, p. 96) was entered, to divide the spoils acquired by the sale; and this decree found—(literally "*found*")—certain alleged debts to be due by the partnership. These debts did not give jurisdiction to sell, however, because in October, 1855, and even in May, 1856, when the sale was had, these claims were unknown to both heirs and administrator, and had not appeared on the record.

The amiability of the creditors who deferred so long the presentation of their claims, was only equalled by that of the counsel, who so cheerfully consented to their allowance!

If a secondary object of this decree was to clinch, by an after-thought, one of the most barefaced swindles ever perpetrated under the cloak of judicial proceedings, we submit that this decree can have no such effect.

It was necessary that the lien or debt should be found to exist before the sale could be ordered (3 Blackf, 457; 1 Litt., 27; 4 Litt, 187; 3 Marsh, 177.)

Thirdly, Neither the decree of October 27th nor of May 14th, pointed out, or described, or referred to, the lot in controversy, in any manner by which it could be identified (Record pp. 51, 95). They do not even direct the Commissioner to sell the lots mentioned in the declaration or complaint.

These decrees were to a certain extent *in rem.* Like an attachment, they sought the sale of certain specific property. The object was not, as in a judgment or execution at law, to realise a certain sum out of the property of Matilda or Franklina Gray, but to sell certain specific property, known as partnership property. As this property was real estate, the decrees should have pointed out by metes and bounds, or at least have identified by a reference to the complaint, the precise portions of the realty to be sold.

Here it will be observed there was to be no levy—no return. There was absolutely nothing to determine nor identify the lots to be sold. The subsequent description of this lot in the deed did not help this vagueness of the decree, 18 How. U. S., 297; 2 Jones (Law) N. C., 354; Hoffman *v.* Daumer, 14 Penn, 27.

The decree did not direct this lot to be sold (See decrees in Record, pp. 51–95.)

Fourthly—This lot was not partnership property.

The decree of May 14 directs a sale of all the "real and personal property of said partnerships," but leaves to the Commissioner and the parties to determine at their peril what is partnership property. Manifestly there is no authority to sell anything which is not partnership property, and such sale is clearly void as against the true owners. If the land of A be sold under an execution against B, A does not thereby lose his title.

If this lot was not partnership property, a sale under the decree of May 14 would not divest the title of the true owner.

no

Now it appears from the Record (pp. 111, 112), that there never was any partnership as between Wm. H. Gray & F. C. Gray, nor was there, in fact, between Eaton and Gray, as we will show hereafter. Indeed the record fixes these facts, for the decree of October 27 was reversed on appeal, and the action was finally dismissed as to both Wm. H. Gray and Eaton (Record. pp. 106–117).

As a matter of fact, then, this lot was not partnership property, and was not liable to sale under the order of May 14.

It did not come within the power. It was not partnership property, and therefore was not ordered to be sold.

To this point we have claimed—

(1.) That the decree of October 27 did not order a sale; that of May 14, being made afterwards, gave no authority.

(2.) The decrees found no debt or lien in favor of any creditor or partner, and therefore equity had no power to sell it as partnership property, but only under proceedings in partition.

(3.) The decree did not identify the lot, and the Commissioner had no authority to sell. He had no right to exercise his own judgment as to whether it was partnership property.

(4.) If he had his decision was erroneous, for the lot was not partnership property in fact, as the reversal on record discloses.

If it be answered to this, "at the time the sale was ordered, the Court had determined that this lot was partnership property, and the Commissioner and the purchasers had a right to repose on this decree, and are unaffected by any subsequent adverse decision upon appeal," we have a two-fold answer.

First—Conceding there was such an adjudication, the purchaser took, subject to our right of having this question reviewed on appeal,—such appeal was a continuation of the action,—on such appeal it turned out that the Court below was mistaken, and had sold property as partnership property which was not such.

It would be very remarkable that the heirs should succeed in establishing finally that the land *was theirs* and *always had been*, and not partnership property, and yet by some alleged duty of the Court to protect *bona fide* purchasers, they were to lose the fruit of their victory!

To this point we have argued, as though some adju,dication had at some time existed, that the lot in controversy was partnership property. *Such is not the fact.*

The decree of October 27th having found the existence of the alleged partnership, proceeds to declare its nature and define its boundaries, by mentioning that it embraced all the property of all the co-partners (Record, pp. 51, 52); but it is very manifest that these words of the decree are not used for the purpose of "*legally vesting*" in such partnership all such undefined and unknown property, but for the purpose simply of illustrating the nature and defining the limits of the partnership, whose existence had just been judicially recognised and established. For further on, in this decree it is provided that the Commissioner shall "take and report an account of the property of this partnership" (Record, pp. 53 [119]), and one would naturally expect that after such Report came in, the Court would pass upon the matter therein referred, and determine what was partnership property and what was not.

The decree of May 14th, however, shows no such ad judication, and the only question left is whether we are bound by the Report.

Let us suppose that this had been a formal report of the officer, showing that he had taken the proper testimony, and had determined that certain property, including this lot, was partnership property, &c., &c., then we should have a sufficient answer to such Report.

1. Such officer had no *judicial power*. He was not a Master in Chancery. It was impossible for the Court to delegate any such power to him.

2. If it could, then he was a Referee under the Practice Act of California, §§ 154, 155.

If he was such Referee his report when confirmed is not an adjudication of the Court, 3 Jones Eq., N. C. 345; Riley Ch., 13[illegible]; 1 McMullen Ch. 157; Phelps *vs.* Peabody, 9 Cal., 224; 3 W. & M., 258; 4 Edw. Ch., 596.

It was only like to the special verdict of a jury. Walton *vs.* Minturn, 1 Cal., 362; Ritchie *vs.* Bradshaw, 5 Cal., 228; 9 Cal. 213.

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But the verdict not having been embodied in any decree, and the final decree having been subsequently reversed on appeal, the verdict fell with that reversal, and when this action was commenced there was no such verdict in existence to be pleaded by way of estoppel.

Starkies Ev. 246, and cases cited 2 Binney 70. See also Mahoney *vs.* Ashton, 4 Har. & McHen. 246; Richardson *vs.* Parsons, 1 Har. & John 253 ; Wood *vs.* Jackson, 18 Wendell 114.

As an estoppel, however, the report or verdict could only be relied upon when pleaded as such. Trevivian *vs.* Lawrence, 1 Salk. 276 ; Outram *vs.* Morewood, 3 East 364.

The report or verdict, then, was no part of the authority to sell, and we are in no event concluded by it.

If it were worth while to pursue this subject further we might add, that there is no such formal report in the record as we have supposed. The Commissioner seems to have *assumed* that all the property of F. C. Gray was partnership property, and the only mention made of this portion of the duty devolved upon him by the decree, is at page 67 of the Record, where may be found a schedule annexed to his report, headed, "A list of real property, notes and other personal property belonging to the partnership of F. C. Gray, deceased, and C. J. Eaton."

We respectfully submit that if a formal report up on the merits of the question had been made, it would have been unavailing, and therefore we trust that our rights are not to be here determined upon the *accidental* caption of a schedule to a Report!

Not only was the Commissioner mistaken in assuming that this lot was partnership property, and there-

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fore liable to sale, but he was mistaken in supposing the State Court ever had any power to sell it. In fact it had none for two reasons:

1. This lot was *real estate*, and whatever may be the powers of Equity over the *personalty* of a partnership, its peculiar and restricted jurisdiction does not allow it to sell the realty except in certain specified cases. Indeed, for a long time it was held that real estate could not become, like personalty, the property of the surviving partners, but that it descended to the heirs of the holder of the fee. Lake *vs.* Craddock, 3 P. Wms. 27. Thornton *vs.* Dixon, 3 Bro. C. C. 199. In the latter case three paper makers owned land and a paper mill, which they used for the purposes of trade. Lord Thurlow held the land to be real estate, and not in the nature of personalty. So, in Bell *vs.* Phyn, 7, Vesey, 453: Three co partners bought land, and paid for it out of the partnership. It was held real estate and went to the heirs. In Balmain *vs.* Shore, 9 Vesey, 500, land purchased by a co-partnership was held to be real estate. In Randall *vs.* Randall, 7, Sim, 271, two brothers formed a co-partnership in farming, and other co-partnerships, and bought land with partnership funds. The land was held to be real estate, and not personalty.

Cookson *vs.* Cookson, 8 Sim. 529, is a strong case, The parties agreed that "the freehold hereditaments should at all times be considered and treated as part of the joint stock of the partnership." The bill was filed to have the interest of the elder Cookson declared stock in trade, and have it sold. The Vice Chancellor held it was real estate, and Equity had no power to sell it.

There have been some cases in which there was an express contract between the partners, to the effect that the real estate of the partnership should be deemed personalty, or stock in trade, and where there was such an agreement, Equity has held it to be a conversion of the real estate into personalty, and has therefore decreed it should be sold as such. But these cases all turn upon the contract between the partners. and are not any authority to show that, in the absence of such an agreement, there is *any rule of law* which supplies its place, and, by force thereof, converts the real estate into personalty. The class of cases to which we now allude are such as Ripley *vs.* Waterworth, 7, Ves. 425. Colly on Part., 72; Smith *vs.* Smith, 5, Vesey 189.

It cannot be denied there have been other cases, in which it has been held, that even in the absence of an express contract, there are certain circumstances from which, Equity will presume its existence; and upon the principle of considering that, as done, which ought to be done, property taken under it is looked upon, treated, and sold, as personalty.

But to warrant the conclusion that there was an intention to convert such real estate into personalty, and therefore to give to Equity any power to sell it, as such, three conditions are necessary.

1. That it should be partnership property.
2. That it should have been purchased with *partnership funds.*
3. That it should have been used for partnership purposes.

The rule is stated, as above, in all the cases which have gone furthest to break down the distinction between real estate and personalty. Perkins Colly on Part. § 145, n. Phillips *vs.* Phillips, 1 My. & K. 649.

In Bisset on Part. 50, (n.) where Phillips *vs.* Phillips is reported, it is said, that the houses not purchased with partnership funds, but devised to the co-partners, although used for the purposes of the partnership were not to be sold as personalty.

After an elaborate review of all the authorities here cited, the Court came to the conclusion stated above in Buckley *vs.* Buckley, 11, Barb. 73.

In the State of New York it is said that the property descends to the heir who is tenant in common with the survivors, citing Perkins Colly on Part. § 133; Howard *vs.* Priest, 5, Metcalf, 582; Buchan *vs.* Sumner, 2, Barb., 165

In Coles *vs.* Coles, 15, John 159, it was said, "in the absence of special covenants between the partners, the real estate owned by them must be considered and treated as such, without any reference to the partnership," citing Thompson *vs.* Dixon and Balmain *vs.* Shore. See, also, to the same effect, the dictum in Smith *vs.* Jackson, 2, Edw. Ch. 82.

The case of Townsend vs. Devaynes, (1 Mont. on Part. App. 96,) is considered to go quite as far as any, in holding partnership real estate to be of the nature of personalty, and liable to sale as such, but the same Chancellor subsequently held, in Stewart vs. Marquis of Bute, 11, Vesey 665: "In cases where persons engaged in partnership have bought freehold estates, the difficulty of distinguishing and arranging property of different natures, partly personal, partly real, has never, except by the effect of the *contract or will*, been held sufficient as against the heir."

By the alleged contract between Gray and Eaton, and by the alleged contract between Wm. H. and F. C. Gray, this real estate was not converted into personalty. There never was a shadow of adjudication, of Report, of proof, or claim, from first to last, of these proceedings, that the lot here in controversy, or any other, was ever paid for with one dollar of partnership funds, or was for one moment subject to any partnership use; nor that any decree had established that there was one dollar of indebtedness due to any partner:—even if it was partnership property, then, there was no decision, or evidence, that it had ever been converted into personalty, and therefore Equity, in these proceedings, had no jurisdiction to sell it, and the State Court never so intended. They only intended to order such portions to be sold as were legally liable to sale.

In the case of Buckley vs. Buckley, 11, Barb., the Court, after an exhaustive and elaborate opinion, came to the conclusion that the real estate therein mentioned could not be sold as personal property of the partnership, but the pleadings and proofs being sufficient, apparently, to sustain the statutory remedy of a partition, an order of sale under such proceedings in partition was made.

In the present case, it will be noted that this Court had no jurisdiction to sell, under proceedings in partition, because under the Statute of California such action can only be brought by the *holder of a legal estate.* Both Wm. H. Gray and Eaton claim, in their bills, that they did not have this legal title, and it was to obtain it, or a sale of it, that they brought their action. If, in the suit brought, they had obtained a deed vesting the legal title in themselves, they would then have been in a position to file a bill in partition. They could not do it; nor could the Court act for them, in this regard, until they had acquired a legal title. Stat. Cal. Comp. Laws pp.568 Practice Act, Cal., §264

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II. This was a dormant partnership, (if any) for, as is alleged in both complaints, (See Record pp. 19 [47] 125–6 [281] all the business was conducted, and all the realty purchased in the name of F. C. Gray alone.

A partnership thus conducted is a dormant partnership. Muchil vs. Dahl, Har. & Gil., 159. Kelly vs. Hurlbut, 5, Cowen, 534.

Equity gives no relief, in such a co-partnership by selling as personalty the realty standing in the name of one partner alone. In Story on Part. § 83, in speaking of partnerships to deal in lands it is said, "the general rules of law applicable to ordinary commercial partnerships are not applied to them, nor are the ordinary *remedies* thereof enforced, either at law or in equity. Thus, for example, the ordinary doctrine of the liability of dormant partners does not extend to partnerships formed for speculation in the purchase of land."

Thus, in Pitts vs. Waugh, 4, Mass., 424, Waugh and Greeley were co-partners in buying and selling land. Waugh gave a note signed by himself alone, to pay for partnership property. Plaintiff proved that the note was made on partnership account, and for lands purchased for partnership. Chief Justice Parsons held "By the law of merchants, a man may be answerable as a dormant partner on a contract made by the partnership, of which he is, in fact, a member. But this law is confined to trade and commerce, but does not extend to speculations in the purchase and sale of land. * * * By the Statute of Frauds no man is chargeable on any contract concerning the sale of lands, but on some memorandum in writing signed by himself."

So, in Patterson vs. Brewster, 4, Edw, Ch. 354, a bill was filed against an association to compel them to pay bonds executed by the agents of the association, and delivered in payment of property purchased by them for the defendants. It was held, "in buying and selling land for profit on the joint account of several, the lands retain all the characteristics of real estate. It is bought and it is sold as such; the title is taken to the purchasers, either in joint tenancy, or as tenants in common, or in the name of a trustee upon certain declared trusts, and as real estate it is sold and conveyed, or, if it remains undisposed of, it descends to the heir. One joint tenant, or one tenant in common, cannot bind his copartner by any contract he may enter into in relation to the lands so held. Each one must contract for himself and for his own share and interest * * * In short, there are among joint owners of this species of property none of the incidental powers which belong necessarily to one of several joint owners of merchandize, chattels, or personal property of any sort where the possession of one is the possession of all, and where all, in respect to ownership, are as but one person."

In Goodwin vs. Richardson, 11 Mass., 469, a mortgage was taken by co-partners to secure a partnership debt. The mortgage was foreclosed. They bid in the land and took it for the debt. The Court held that "the defendants did not hold the land as co-partners, and consequently joint tenants, but they took it like other tenants in common, and the moiety owned by the defendant Whiting was liable to pay the debts of his separate creditors, it being legally the property of Whiting."

In Smith vs. Burnham, 3 Sumner, 439, a dormant partnership in real estate, strikingly analogous to the one at bar, was claimed to have existed between the plaintiff and defendants. Justice Story, in his opinion, evidently places the whole case of the plaintiff upon the theory that he had actually advanced the money which purchased the property. "The deed having been taken or the contract having been made in the name of the defendant alone, Judge Story asks: "How then is the interest of the plaintiff to be made out? It must be by showing there is a *trust created in his favor in the very lands.* Now this is not attempted to be shown by any written evidence or document. The sole reliance of the plaintiff is, and must be, that Burnham and he were at the time co-partners in business, and that the property was purchased with partnership funds; or, that the plaintiff actually advanced his own funds on joint account, which were applied to the purchase, &c., &c.:" then, on page 458, he proceeds to consider whether the alleged partnership is not void, as being within the Statute of Frauds. After a review of many cases, he dismissed the bill, having come to the conclusion, "that the present cannot be deemed the case of a resulting trust in the lands purchased of Black, or of the proceeds thereof, or in any other lands to be purchased on behalf of the asserted partnership; and in the next place, that the whole title of the plaintiff resolves itself into a parol trust, created by an express agreement of the parties in the purchase and sale of lands on joint account, which is prohibited by the Statute of Frauds. * * To permit the plaintiff to recover would break down the whole operation and policy of the Statute of Frauds."

It will be noticed that the foregoing was a bill to obtain a conveyance by the plaintiff from the defendant. Had the bill demanded, instead of a conveyance, that the realty should be sold as personalty, and that the proceeds should be divided, it is clear from the whole scope of the opinion, no such relief could, under any aspect of the case, have been granted.

What we claim here is, that equity would give no such relief as to sell as personalty, the real estate of such a dormant partnership as is set out in the bills To do so, would be to "break down the whole operation and policy of the Statute of Frauds." The utmost relief that equity could give, would be, upon proof of the existence of the trust, to decree a conveyance; and that obtained, the plaintiff could bring partition, and in partition, sell his realty as such.

RECAPITULATION.

To this point we have sought to show that the State Court did not determine by any decree that this lot was partnership property; that if it had, the purchasers took, subject to our right of appeal, and the subsequent reversal, and dismissal of the complaint, forever settled the question that this lot was not partnership property. If they are not concluded by the result of the appeal, still there never was any *decree* finding that the lot was partnership property; the *acts and reports* of the Commissioner were not adjudications of the Court, and were without any authority, unless he was a Referee under the Practice Act of California. If a Referee, then his Report, if formal, would have had no other or greater effect than the special verdict of a jury; and when the judgment was subsequently reversed the special verdict fell with it, and is no longer an authority. Further, we claimed that the Commissioner had never examined or passed upon the question of the title to this lot, even in his Report. We then undertook to show, that it was an absurdity to suppose the State Court ever intended, to order a sale of this real estate; because—1st. Equity never interferes to sell real estate except in cases where such realty, by the contract which purchased the property. "The deed having been taken or the contract having been made in the name of the defendant alone, Judge Story asks: "How then is the interest of the plaintiff to be made out? It must be by showing there is a *trust created in his favor in the very lands.* Now this is not attempted to be shown by any written evidence or document. The sole reliance of the plaintiff is, and must be, that Burnham and he were at the time co-partners in business, and that the property was purchased with partnership funds; or, that the plaintiff actually advanced his own funds on joint account, which were applied to the purchase, &c., &c.:" then, on page 458, he proceeds to consider whether the alleged partnership is not void, as being within the Statute of Frauds. After a review of many cases, he dismissed the bill, having come to the conclusion, "that the present cannot be deemed the case of a resulting trust in the lands purchased of Black, or of the proceeds thereof, or in any other lands to be purchased on behalf of the asserted partnership; and in the next place, that the whole title of the plaintiff resolves itself into a parol trust, created by an express agreement of the parties in the purchase and sale of lands on joint account, which is prohibited by the Statute of Frauds. * * To permit the plaintiff to recover would break down the whole operation and policy of the Statute of Frauds."

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If these positions are correct, it is clear that these premises were not legally liable to sale in these proceedings; and will this Court, by implication or construction, extend the decrees of the State Court, so as to include these premises, and thus convict the State Court of an error which it never committed?

We have heretofore claimed that the reversal by the State Court, and the dismissal of the bill, clearly settled, that as to William H. Gray, there was no partnership; as to Eaton, the opinion of the State Court passed simply upon the effect of the alleged contract between him and Gray; but failed to express any opinion whether such contract was genuine,—was executed by Eaton,—was so far acted on by him as to be binding—or whether any lands were acquired under it. The decree was reversed, and all these questions were left to be determined on a new trial, if one should be granted below; that new trial never took place, but the whole bill was dismissed (See Record, p. 117). If it is not already determined by that record, that this land was not *partnership property*, it certainly is nowhere determined by it, that it was, and that question is now open for this Court to pass upon, if necessary.

V.

This lot never was partnership property of the partnership of Gray & Eaton, because no such partnership ever existed.

The conveyance from F. C. Gray to Eaton is spread upon the record at p. 40.

This is a conditional conveyance of one-fourth interest in all property, real or personal, of F. C. Gray, without describing any specific lot. The conditions are as follows, to wit: "The said Eaton agrees and binds himself to remain with the said Gray for the term of two years from the first day of January, 1851, &c., &c. Should this connexion be dissolved by the death of either of the parties, the affairs shall be closed in the following manner: If dissolved by the death of the said Eaton, his heirs shall receive from the said Gray, the sum of one thousand dollars per month for his services, from the first day of January, 1851, until the time of his decease; and if by the death of the said Gray, the said Eaton shall, for settling up the estate of the said Gray, receive the full amount of this contract as fully as if the time had been completed."

This contract did not create any legal partnership. Chase vs. Barret, 4 Paige, Ch. 159.

Eaton, under it, had none of the powers of a partner over the real estate standing in the name of Gray alone, nor was he liable to creditors as a dormant partner. (Pitts vs. Waugh, 4 Mass., 424). If he had died first his heirs could have sued and collected $1,000 per month for his services; they would have been entitled to no account—no interest in this alleged partnership property.

The record shows at page 126–7, that Eaton did not settle the estate of Gray, but abandoning it to strangers, joined in the litigation against it, and became a co-worker with Wm. H. Gray, whose claim was pronounced false, and therefore fraudulent by the Supreme Court.

Eaton may possibly have rights as a tenant in common with the heirs, and upon proof that he had complied with the terms of the contract, might have obtained a decree for a conveyance from the heirs, but he certainly showed no partnership which authorized, or ever could authorize any Court to sell such real estate as personalty.

VI.

The deed of the Commissioner did not convey any title to the purchaser, because Equity has no inherent powers to divest a legal title.

On the death of Gray, the legal title to this land vested in the widow and and child. No deeds from them to the Commissioner or purchasers have been executed. The Commissioner could convey no greater title than he had, or had power to convey. Did the decree of the Court operate upon the legal title in the heirs, so as to vest it in the Commisssioner or confer upon him any power to convey it?

In this action the Court was exercising a power exclusively belonging to a Court of Equity,—the power of closing up a partnership and selling partnership property. It sought to effect this, not under an execution, but under a process or order of sale peculiar to a Court of Equity. Whether the Court had power to order the sale or not, it had no power to change the legal title, except by acting upon the heirs, in whom it was vested, or by procuring a conveyance from some officer, in whom the Statute, and not the Court, had vested a power to convey.

This point having been argued at length, and decided against us in the Court below, (although in the absence of the Circuit Judge,) we have cited more authorities upon it here than would otherwise appear necessary.

It is a cardinal maxim that Equity acts in personam and not "in rem." "The Chancellor cannot bind the *right*, but only coerce the person" (Spence's Equity Jurisdic. of Chancery, vol. 1, 392, and cases cited.) "Formerly a decree in a Court of Equity, unless it was "for the land itself, operated only in personam, and "the only method of enforcing it was by means of what "is termed process of contempt against the party dis-"obeying it, under which the party, if arrested, might "be kept in prison till he obeyed. * * * Where "the contemnor could not be arrested, or having been "arrested, if he remained in prison without paying "obedience to the Court, it was the practice to issue a "writ of sequestration directing the Commissioners "to sequester the personal property, and the rents "and profits of his estate," &c., &c. (Daniels, Ch. Pl. & Pr., vol. 2. 1236, 1237–8.)

The English Court of Chancery has often directed the imprisonment of heirs, who refused to convey in accordance with its decrees; and has compelled the owner to join in the conveyance where the sale was had by virtue of a decree foreclosing a mortgage (1 Sug. Vend., 594–57.)

So, too, purchasers have been compelled to take equitable titles, where the sale was under a decree in Equity, the legal title remaining vested in the heir. (Coop. 138; 3 Swanst, 566.)

In Lord Waltham's will case (1 Sugd. Vend. 598, § 67), the purchaser refused to complete the sale, because the legal title remained in the infant; but, said Lord Rosslyn, "having purchased at the sale, he must take such title as the Court can give;" and the Court would not allow application to be made for an Act of Parliament to divest the title of the heir.

In Noel vs. Watson, Coop. 138, the purchasers objected to paying their money, "because the remainder man had gone abroad, and no conveyance from him could be procured."

In Powell vs. Powell, 6 Madd., 533, it was objected "that the vendor, who was a purchaser under a decree in Chancery, obtained nothing but an equitable title," and the vendee refused to take such a title. Lord Rosslyn held that he would not compel him to accept it, "because the vendee was not a purchaser under the decree."

In Bullock vs. Bullock, the vendor died, his heir filed a bill to compel the vendee to complete purchase. The master refused "to let the money go out of court until the infant came of age, so as to execute the deed."

Now, if a Court had power to divest the title of heirs and remainder men, by simply directing the master to convey their title, why resort to imprisonment in the fleet and sequestration, to wrest a title from unwilling owners? Why did Lord Elden compel unwilling owners to join in a conveyance where the sale

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was under a foreclosure? Why were parties compelled to take equitable titles alone to lands purchased under decrees? Why do they come in to object that heirs are within age and remainder men are gone abroad?

Up to the time of Shaw vs. Wright, 3 Vesey, 22, no one had supposed the Court had any power to order a sale of real estate, under proceedings to sequester property; then the application having been made, the Lord Chancellor said: "I should not have much difficulty in selling not only perishable commodities, but if the sequestrators were in possession, of rents paid in kind or the natural produce of a farm, *but how shall I make a title?* By whom? I cannot well order the sequestrators to sell without at the same time warranting the title; then I do not know how I can do that. *It does not transfer the term to the sequestrators.* * * * The difficulty is this, if the sequestrators sell and the purchasers should be brought before this Court to complete their contracts, I could not compel them to pay the money. * * * You will not find an instance of an order to sell, under a sequestration, *a subject which passes by title* and not by delivery."

This decision was made in December 1795, and it is pretty clear that down to the period of our separation from the mother country, Chancery had no power to transfer or convey a legal title.

To the foregoing case is appended the following note:—"In consequence of what fell from the Lord Chancellor in this cause, an Act of Parliament, 36 Geo. III., c. 90, was passed, giving the Court power in certain cases to alienate the bank stock standing in the name of absent or infant defendants."

Afterwards another remediel statute was passed, 1 & 2 Geo. IV., c. 114; then the preceding Acts were consolidated by 6 Geo. IV., c. 74. This statute was afterwards repealed, and the 11 Geo. IV. and 1 Wm. IV., c. 90, passed, re-enacting many of its provisions. These last acts were subsequently repealed, and the Trustee Act of 1850 (13th & 14th Vic., c. 60) substituted. A complete history of this legislation, made to supply the acknowledged defects in the power of the Court, may be found in Lewin on Trusts, p. 832 to 840 (Law Library, new series, vol. 82).

This writer, at the conclusion of his review of this statutory extension of the powers of Equity, remarks in speaking of the Trustee Act of 1850: "The chief feature of the Act in connexion with the subject of this chapter was *the authority* given the Court, to divest the legal estate, out of the person from whom a conveyance might be desired, and vest it in the proper person or persons, by the mere order of the Court itself, now familiarly known as a vesting order."

This inability of Equity, by virtue of its inherent powers to transfer or divest the legal title of the heirs, has been repeatedly acknowledged both by the Courts, and by Legislatures.

Murray Hoffman, for many years a Master in Chancery,—subsequently a Justice of the Superior Court of the City of New York, and universally admitted by the bar to be one of the best Chancery lawyers in the State, in his book entitled "Hoffman's Master in Chancery," page 179, speaks as follows. After referring to the power of Chancery under the Statute of Partition in that State, he says: "In Thompson *vs.* Hardman (6 John, Ch. 436), some observations upon this point, as well as to whether a sale might not be conducted by a Master, in the place of Commissioners, were submitted to the Chancellor. But the Chancellor said: 'There was one insuperable objection to the latter course—

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namely, ALL the parties must then execute conveyances to the purchaser, which would in most cases be very difficult and embarrassing. * * * The Legislature might authorize the Master to execute a deed to the purchaser, as he is authorized to do in the case of a sale of mortgaged premises. * * * The difficulty is, that by a decree of the Court, although the rights of all parties interested are bound, yet *no legal title is conveyed to the purchaser*."

In Ferrebee *vs.* Proctor (2 Dev. & Bat. Rep., p. 439.) also reported in Iredell, the plaintiff, as administrator with the will annexed, filed his bill to obtain a sale of the lands of the decedent, for the purpose of paying debts, &c., &c. The Court passed a decree directing the administrator to sell the lands, to apply the proceeds, &c.

Soon after, Ferrebee sold the lands in accordance with the decree, and executed a deed. This happened in April, 1804. Afterwards, in 1806, the widow died,—then one child,—and in 1836, Ferrebee, the administrator died,—and the next year the action was brought.

The Court below held that "the deed made pursuant to the sale and under the decree of the Court was at least color of title."

The Appellate Court held (see page 447) this language: "Has the estate which descended to the heir been divested. It can have been divested by means only of the decree of the Court of Equity, or of the deed of Thomas C. Ferrebee, made under the authority of that decree or of his administration. We think they are all insufficient. * * *

Nor does it (his deed) derive any efficacy from the decree of the Court of Equity. * * * These ends are not attainable in reference to a change of the legal title by a decree that the land shall be sold, nor by a decree that when sold it shall be conveyed by a particular person, unless that person actually convey, *and* unless he hath the legal title or a power *to convey it, which is recognized to be so by the law.* The Court of Equity does not act upon things but persons. * * The decree does not therefore constitute a title at law, nor does it enter into it. The title passes by the deed which the decree compels *the party to the suit* to execute. If the deed be made by a person who *had not the estate* or a *legal power to convey it,* it will not pass the title at law, although made under the decree of a Court of Equity. * * * * In other words, a Court of Equity cannot, by a decree, make that a legal title which is not a legal title. In the case under consideration, the Court could have directed a good title if the proper parties had been before it. * * * The conveyance of the executor and the heirs would have passed the title. * * * The observations upon conveyances made under the direction of a Court of Equity will readily be seen to have no application to sales *under execution,* from that Court, or for partition. In those cases the deeds of the sheriff and clerk and master operate by virtue of the legal authority expressly conferred by Statute."

In Mississippi there is a Statute giving to Commissioners power to sell the title of all parties to the action, (Hutchinson's Miss. Code, 798). In the case of Walker *vs.* Williams, 30 Missi. (1 Geo.) 165, a sale was had under a decree which directed that the title of the plaintiff be divested; but it was held that the decree was in itself inoperative to divest a legal title.

In the State of Ohio there is a Statute to the effect that when the decree directs a conveyance to be made, and the parties refuse, the decree shall stand as a conveyance. Such a decree having been made by the

Circuit Court of the United States sitting in that State, it was held in Shepherd *vs.* Commissioners of Ross County (7 Ohio, 271), that "The decree of the Circuit Court had no such effect," it not being a State Court, and "no title passed under such a decree."

But if the decree did not vest the title in the Commissioner for the purpose of the conveyance, has the *Statute* given to the Commissioner any power to convey away the title of the heir, under the direction of the Court?

In nearly every State in the Union there is some statute providing for a conveyance of land sold under a decree in Equity. In some, as in New York, the same result is accomplished by putting decrees against property on the same footing as judgments, and providing for their enforcement by an execution, by virtue of which the sheriff exercises a statutory power of sale, as he does on judgments at law.

In others, as in Ohio and New Jersey, it is provided that if the holder of the title refuses to convey, the decree of the Court shall itself operate as a conveyance.

In others again, as in Kentucky and Mississippi, the Legislature gave to the Court the power to appoint a Commissioner "whose deed should operate to convey the title of the parties."

But in California *no such statute ever existed!* A Commissioner for any such purpose is an officer absolutely unknown, and in that State, the legal title to land must pass through the Sheriff. There is no law for any other mode of transfer, and an attempt to convey, as in this case, is an empty usurpation of power.

To obviate this rather palpable objection, it was suggested that, after all, this sale was not had by virtue of the peculiar power of Chancery over partnership property, but under proceedings in PARTITION under the Statute! and that the Commissioner had the title vested in him as a Referee by virtue of that Act!!

The difficulty with this theory is, that it is inconsistent with all the decrees and proceedings in the case. It is a recent discovery, to avoid the plaintiff's last point.

The Court had no inherent equity powers to sell, in partition cases, but derived them from the Statute of Partition. The original Act was that of 31 Henry VIII., amended by 8 & 9 Wm. III. These Acts gave the Court no power to sell See the able and elaborate opinion of Justice Woodworth in Gallatin *vs.* Cunningham (8 Cow., 366.)

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Under the Statute of California, it could only have been sold upon proof that a sale was necessary. No such proof was had (Comp Laws, Cal. § . Practice Act, Cal. §275.)

Such preliminary proof was essential (Gallatin *vs.* Cunningham (8 Cow., 366.)

There was not even an allegation in the complaints that partition could not be *had*, and of course there could have been no such proof offered. Indeed the Record shows that the property consisted of different city lots easily susceptible of partition; so that this Record, as it happens, shows affirmatively, that the Court could not have ordered a sale, under the peculiar provisions of the Statute of Partition, relative to such lands as cannot be partitioned. (See Gallatin *v.* Cunningham, 8 Cow. 366).

Again, which is conclusive, the 27th section of the Act of California then in force (Stat. Cal., 1854, p. 63.)

gave the remedy in partition solely to *a holder of* "*an estate of inheritance, or for life or for years.*"

Neither William H. Gray nor Eaton ever had any legal title to this lot, and it was just because they did not have it that they filed their Complaints to have the Court adjudge what portion of the property equitably belonged to them.

It is doubted whether any statute can be found by which the *cestui qui* trust or owner of an Equity alone, can maintain partition.

VII.

The decrees were obtained by fraud, of which, the Record gave the purchasers notice.

1. The partnerships set out in the pleadings were of so remarkable a character as to excite suspicion that each claim was fraudulent (Record, pp. 18–124).

2. The Record shows collusion between Wm. H. Gray and Eaton, to obtain the decree of October 27th.

   a. William H. Gray was *not made* a party by Eaton, because Eaton knew Gray had no claim (See Eaton's Complt., p. 124).

   b. But Gray and Eaton having agreed on a combined attack on the estate, the *appeal* of the *defendants* on the Gray claim, in the Supreme Court was dismissed, *October* 1, 1855. (See Record, p. 38.

   c. Although Eaton had been made a party to Wm. H. Gray's suit—had appeared and put in an answer, sworn to November 3, 1854, in which he *denied that Wm. H. Gray was a* *partner with F. C. Gray* (see Record, p. 30) —still on *October* 23, 1855, he amended his own complaint, and made Wm. H. Gray a defendant. This was twenty-two days after the above mentioned dismissal of appeal.

d. Gray was thus made a party by consent. See Stipulation dated October 23, 1855 (Record, pp. 49 & 50).

e. On the same day (October 23) Wm. H. Gray *filed his answer* to Eaton's complaint, denying, for the sake of appearances, Eaton's interest in F. C. Gray's estate! (Record, p. 50.)

f. But on the same day Gray & Eaton ***signed a consent*** to consolidate their claims!! (Record, p. 39) dated October 23, 1855.

g. Within *four* days after Wm. H. Gray thus swore that Eaton had no such interest, a *joint* decree is filed, finding the existence, first of one partnership and then of the other, and providing for a sale of all the realty belonging to Gray's heirs. Such a decree could hardly have been drawn in the four days which elapsed between the time when Gray was made a party defendant and the date of its entry.

This decree *recites no trial* and *no consent*, although the latter sufficiently appeared from the following endorsement of the District Judge subsequently made at the foot of the decree: "When the above decree was signed it was stated to me that the above decree was by consent and agreement of all the parties thereto" (Record, pp. 55).

h. Not only does the collusion, but the very terms of the bargain, appear on the decree. Wm.

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H. Gray claimed that his co-partnership began in 1849 (see Gray's Complaint, Record, pp. 18, 19); Eaton, that his began in 1851. Gray's was the *first* partnership, and he demanded *one-third* of the estate. This would have reduced Eaton's share, to which he would not agree: and therefore to secure him, the decree provides that "the partnership between F. C. Gray and Wm. H. Gray *was subject* to the said partnership between F. C. Gray and C. J. Eaton (Record, p. 52). Eaton thus obtained one-fourth of the entire estate, and permitted Wm. H. Gray to come in after him, with his partnership, and take his one-third out of the property of the widow and child!

But Wm. H. Gray's partnership having, as was alleged, commenced in 1849, it was difficult to devise a plan by which the Court should not observe this peculiarity of making the first partnership in point of time subject to the *second!* To obviate this difficulty, the happy expedient was hit on, of leaving blank the date when Wm. H. Gray's partnership commenced, and so stands the blank in the Record to-day (See Record, p. 52).

i. But it was necessary that no one judge should know too much of these proceedings, and so it was to a judge from another district that they applied for the order of sale dated May 14." (See Record, p. 95, 96.)

j. And then when they come to divide up a portion of the spoils all the attorneys *consented* to the decree of June 11th. See Record, p. 97.

k. It will be noticed that three judges were necessary to carry this project through, no one of whom probably knew the acts of the other.

One of the best evidences that this notice from the Record, actually reached the purchasers, was, that very many who bid at the sale on the 3d of May, refused or neglected to complete their purchases, and the Commissioner subsequently, without (so far as the Record shews) any attempt to compel them to pay their bids, and without any further order from the Court, put the property up for sale again on the 21st of June. The difference betwen the prices bid at the second sale as compared with the first are instructive. See Record, pp. 98 & 90.

It was not until the 21st day of November, 1856, that any report of these sales was made, and on that same day the proceeds had all been divided up among the parties, the accounts had been filed, including that of Wm. H. Gray, finding a balance due him of $3,533 17¼, and the final decree had been entered.

Did not this Record, beginning with the complaint of Wm. H. Gray, including all these accounts. stipulations, consents and extraordinary proceedings, and terminating with the judgment due Gray of over $3,500, give to the purchasers such notice, as to render it worth while for them, to apply to the heirs, to see if these proceedings were warranted.

All which is respectfully submitted.

PHILIP G. GALPIN.

No. 1 Park Place, N. Y.,
Dec. 28th, 1863.